

No. 87-1589-CFX  
Status: GRANTED

Title: Pittsburgh & Lake Erie Railroad Company, Petitioner  
v.  
Railway Labor Executives' Association

Docketed:  
March 24, 1988

Court: United States Court of Appeals  
for the Third Circuit

Vide:  
87-1888

Counsel for petitioner: Wyatt, Richard L.

Counsel for respondent: Clarke Jr., John O'B., Rush, Henri F.

See also:  
87-1888  
87-2049  
88-217  
88-464  
88-711

Entry	Date	Note	Proceedings and Orders
1	Jan 20 1988		Application for extension of time to file petition and order granting same until February 23, 1988 (Brennan, January 20, 1988).
2	Feb 12 1988		Application for further extension of time to file petition and order granting same until March 24, 1988 (Brennan, February 17, 1988).
3	Mar 24 1988	G	Petition for writ of certiorari filed.
4	Apr 19 1988		Brief amicus curiae of Natl. Railway Labor Conference filed.
7	Apr 21 1988		Order extending time to file response to petition until May 24, 1988.
5	Apr 27 1988		Supplemental brief of petitioner Pittsburgh & Lake Erie Railroad Company filed.
8	Apr 27 1988		LODGING RECEIVED.
9	May 27 1988		Order further extending time to file response to petition until May 31, 1988.
10	May 27 1988		The above further extension of time was granted by Justice Brennan.
11	May 31 1988		DISTRIBUTED. June 16, 1988
12	Jun 1 1988		Order further extending time to file response to petition until June 6, 1988.
13	Jun 6 1988		Brief of respondent Railway Labor Executives' Assn. in opposition filed.
14	Jun 14 1988		REDISTRIBUTED. June 29, 1988
16	Jun 22 1988	X	Reply brief of petitioner Pittsburgh & Lake Erie Railroad Company filed.
18	Jun 30 1988	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
20	Nov 7 1988		Brief amicus curiae of United States filed. VIDED.
19	Nov 8 1988		REDISTRIBUTED. November 23, 1988
21	Nov 10 1988	X	Memorandum of respondent ICC filed. VIDED.
22	Nov 18 1988	X	Supplemental brief of respondent Railway Labor Executives' Assn. filed.
23	Nov 22 1988	X	Supplemental brief of petitioner Pittsburgh & Lake Erie Railroad Company filed. VIDED.
24	Nov 28 1988		Petition GRANTED. The case is consolidated with 87-1888, and a total of one hour and thirty minutes is allotted

Entry	Date	Note	Proceedings and Orders
			for oral argument. *****
25	Dec 6 1988		Appendix of petitioner Pittsburgh & Lake Erie Railroad Company filed. VIDE.
26	Dec 19 1988	D	Motion of respondent to argue these cases in tandem with No. 88-1, Consolidated Rail Corporation v. Railway Labor Executives Association filed.
27	Dec 28 1988	G	Application (A88-512) by Pittsburgh & Lake Erie Railroad Company to file a in excess of page limits, submitted to Justice Brennan.
29	Dec 28 1988		DISTRIBUTED. Jan. 6, 1989. (Motion of respondent to argue this case in tandem with 88-1, Consolidated Rail Corp.v. Rwy. Labor Exec. Assn.).
28	Dec 30 1988		Application (A88-512) granted by Justice Brennan, allowing a maximum of 75 pages.
31	Jan 5 1989		Order extending time to file brief of petitioner on the merits until January 19, 1989.
32	Jan 9 1989		Motion of respondent to argue these cases in tandem with No. 88-1, Consolidated Rail Corporation v. Railway Labor Executives Association DENIED.
33	Jan 9 1989		Record filed.
		*	Certified coy of original record, box, received.
34	Jan 17 1989		Record filed.
		*	Certified copy of C. A. proceedings received.
37	Jan 18 1989		Brief amicus curiae of Natl. Railway Labor Conference filed. VIDE.
39	Jan 18 1989		Brief of respondent ICC filed. VIDE.
35	Jan 19 1989		Brief amici curiae of Regional Railroads of America, et al. filed. VIDE.
36	Jan 19 1989		Brief amicus curiae of South Dakota filed. VIDE.
38	Jan 19 1989		Brief amici curiae of Guilford Transportation Industries, Inc., et al filed. VIDE.
40	Jan 19 1989		Joint appendix filed. VIDE.
41	Jan 19 1989		Brief of petitioner Pittsburgh & Lake Erie Railroad Company filed. VIDE.
42	Jan 19 1989		Brief amicus curiae of United States filed. VIDE.
43	Jan 19 1989		Brief amici curiae of Chicago & North Western Transportation Co., et al. filed. VIDE.
44	Feb 1 1989	G	Application (A88-614) by Respondent Railway Labor Executives' Association to file a respondent's brief in excess of page limits, submitted to Justice Brennan.
45	Feb 1 1989		Application (A88-614) granted by Justice Brennan, allowing a maximum of 75 pages.
46	Feb 3 1989		SET FOR ARGUMENT WEDNESDAY, MARCH 29, 1989. (3RD CASE -- 1 HOUR 30 MINUTES)
47	Feb 3 1989	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
49	Feb 8 1989		Order extending time to file brief of respondent on the merits until March 1, 1989.
50	Feb 8 1989		Response filed by respondent ICC to motion of the Acting

Entry	Date	Note	Proceedings and Orders
51	Feb 10 1989		Solicitor General to participate in oral argument. Response filed by petitioner to motion of the Acting Solicitor General for leave to participate in oral argument.
52	Feb 13 1989		Response filed by respondent to motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae.
54	Feb 13 1989	D	Motion of respondent Interstate Commerce Commission for divided argument filed.
53	Feb 14 1989		Response filed by National Railway Labor Conference, et al. to motion of the Acting Solicitor General for leave to participate in oral argument.
55	Feb 21 1989		Motion of respondent Interstate Commerce Commission for divided argument DENIED.
56	Feb 21 1989		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. to be divided as follows: 30 minutes for the petitioner; 30 minutes for the respondent; and 30 minutes for the Acting Solicitor General, as amicus curiae.
57	Feb 23 1989		Order further extending time to file brief of respondent on the merits until March 3, 1989. CIRCULATED.
58	Mar 1 1989		CIRCULATED.
59	Mar 1 1989		CIRCULATED.
60	Mar 3 1989	X	Brief of respondent Rwy Labor Exec. Assn. filed. VIDE.
61	Mar 3 1989	X	Brief amicus curiae of AFL-CIO filed.
62	Mar 7 1989	G	Application (A88-710) by Petitioner to file a reply brief in excess of page limits, submitted to Justice Brennan.
63	Mar 8 1989		Lodging received.
64	Mar 9 1989		Application (A88-710) granted by Justice Brennan, allowing a maximum of 35 pages.
65	Mar 22 1989	X	Reply brief of petitioner Pittsburgh & Lake Erie Railroad Company filed. VIDE.
66	Mar 29 1989		ARGUED.

87-1589

Supreme Court, U.S.

FILED

MAR 24 1988

JOSEPH F. SPANIO, JR.  
CLERK

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1987

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

Richard L. Wyatt, Jr.  
Akin, Gump, Strauss, Hauer  
& Feld  
1333 New Hampshire Ave.,  
N.W.  
Washington, D.C. 20036  
(202) 887-4000  
(Counsel of Record)

G. Edward Yurcon  
The Pittsburgh & Lake Erie  
Railroad Company  
780 Commerce Court  
Four Station Square  
Pittsburgh, Pennsylvania 15219  
(412) 261-3201  
(Counsel for Petitioner)

Ronald M. Johnson  
Mary Qualiana  
Donna M. DeSilva  
Akin, Gump, Strauss, Hauer  
& Feld  
1333 New Hampshire Ave.,  
N.W.  
Washington, D.C. 20036  
(202) 887-4000

Date: March 24, 1988

113 PM

### **QUESTION PRESENTED**

Are federal district courts deprived of jurisdiction by Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, to enjoin strikes by railroad unions designed to block railroad transactions approved by the Interstate Commerce Commission, where the unions participated in the administrative proceedings approving the transaction.

## RULE 28.1 LIST

Pursuant to Supreme Court Rule 28.1, Petitioner, The Pittsburgh & Lake Erie Railroad Company, lists the following entities as related parents, subsidiaries, affiliates, or companies in which it holds an interest:

PLECO, INC.  
The Montour Railroad Company  
The Youngstown & Southern Railroad  
Company  
The Pittsburgh, Chartiers and  
Youghiogheny Railroad Company  
The Monongahela Railway Company

## LIST OF PARTIES

The parties to the proceeding below were the Petitioner, The Pittsburgh & Lake Erie Railroad Company, and the Respondent, Railway Labor Executives' Association.

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No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
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THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
Petitioner,  
v.  
RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
Respondent.

\_\_\_\_\_  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT  
\_\_\_\_\_

The Pittsburgh & Lake Erie Railroad Company ("P&LE") respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on October 26, 1987.

#### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 831 F.2d 1231 and is reprinted in the Appendix hereto at App. A.<sup>1</sup> The unreported Findings of Fact, Conclusions of Law, and Order of the District Court for the

<sup>1</sup> Each item in Petitioner's Appendix ("App.") is individually lettered, pages within are then numbered with the appropriate letter prefix. E.g., App. A pages are A-1--A-13.

Western District of Pennsylvania entered on October 8, 1987 are reprinted in the Appendix hereto at App. B.

### JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1337. On October 8, 1987, the District Court entered a preliminary strike injunction pursuant to P&LE's counterclaim. On October 26, 1987, the Third Circuit summarily reversed the injunction granted by the District Court. Petitioner did not file a petition for rehearing. Justice Brennan granted P&LE extensions of time for filing this petition for certiorari to and including March 24, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### STATUTES INVOLVED

This appeal involves Section 4 of the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. § 104, Section 6 of the Railway Labor Act ("RLA"), 45 U.S.C. § 156, and Sections 10505 and 10901 of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10505, 10901. Each of these statutory provisions is reprinted in the Appendix hereto at App. C. This appeal also involves Interstate Commerce Commission ("ICC") regulations governing ICC authorization of transactions such as the sale at issue in this case. 4 C.F.R. Part 1150, Subpart D. These regulations are reprinted in the Appendix hereto at App. D.<sup>2</sup>

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<sup>2</sup> The ICC has recently amended this subpart of its regulations. *Ex Parte No. 392 (Sub-No. 1) Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901* (served February 29, 1988). See 53 Fed. Reg. 5,981 (1988). The regulations reprinted in the appendix do not reflect these amendments, but rather are the regulations that were in effect at the time of the Third Circuit's decision in this case.

### STATEMENT OF THE CASE

#### The Nature of the Action

The P&LE, which operates 182 miles of railroad, has decided to go completely out of the railroad business. After suffering devastating financial losses in recent years, in an effort to avoid certain bankruptcy and abandonment or liquidation of its rail lines, P&LE entered into an agreement to sell its entire rail lines to P&LE Railco, Inc. ("Railco"), which would operate P&LE's present system. Although Railco would not use the same number of employees as P&LE, Railco indicated it would give preferential hiring consideration to P&LE employees.

After P&LE informed its fourteen unions on July 31, 1987 of the proposed sale, they demanded that P&LE bargain with each of them over the decision to sell and its effects on employees, before consummating the sale to Railco. Notwithstanding P&LE's announced decision to go out of business, P&LE's unions served almost identical notices, under Section 6 of the RLA, 45 U.S.C. § 156, proposing that their collective bargaining agreements with P&LE be amended to include life-time wage guarantees for all current P&LE employees, moving allowances, retraining expenses and the option of a lump sum severance payment for employees placed in a worse employment position for any reason. In addition, any employee adversely affected for any reason during his or her lifetime was to receive "penalty pay" equal to three times the lost pay, fringe benefits, and consequential damages suffered by such employee. The Section 6 notices also proposed that any purchaser of P&LE's lines be required to assume P&LE's existing collective bargaining agreements (including the above-proposed lifetime protective benefits and treble damages provisions), to hire P&LE employees, and to recognize P&LE's unions.

P&LE's unions, as apparently instructed by the Railway Labor Executives' Association ("RLEA"),<sup>3</sup> also proposed that P&LE sell its rail lines to its employees, instead of to Railco.

P&LE responded that it had no duty under the RLA to bargain over its decision to go out of business. P&LE also noted that the sale and its effects on employees were subject to the exclusive jurisdiction of the ICC. P&LE offered nonetheless to meet with its unions to discuss the sale.

RLEA brought this action on behalf of P&LE's unions, seeking to enjoin the sale until P&LE completed the lengthy bargaining and mediation procedures of the RLA. Rather than pursue its complaint for injunctive relief, however, on September 15, 1987, RLEA called a general strike of the P&LE. As a result of this strike, P&LE was completely shut down. No connecting carriers would interchange traffic with P&LE for fear they too would be struck.

#### ICC Authorization of the Sale to Railco

Before Railco could acquire and operate P&LE's lines, it was required to first obtain regulatory authorization from the ICC.

##### 1. General Regulatory Framework

The entry and exit from the railroad business are subject to the exclusive and plenary jurisdiction of the ICC pursuant to the ICA. See, e.g., *Chicago & North Western Transportation Co. v.*

<sup>3</sup> RLEA is an unincorporated association comprised of the chief executive officers of all the major rail unions, including all fourteen of P&LE's unions.

*Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). Section 10901 of the ICA requires a non-carrier, like Railco<sup>4</sup>, who will become a carrier, to obtain a certificate of public convenience and necessity from the ICC. 49 U.S.C. § 10901. Under Section 10901(c)(1)(A)(ii), the ICC has broad discretionary authority to impose conditions protective of the public interest. Courts have long interpreted this conditioning authority to include the power to consider the impact of an ICC-authorized transaction on employees and fashion labor protective benefits. See, e.g., *RLEA v. ICC*, 784 F.2d 959, 965, 969-970 (9th Cir. 1986)<sup>5</sup>

If the ICC determines that regulation is not necessary to carry out national rail transportation policy, it can exempt transactions or classes of transactions from regulatory requirements. 49 U.S.C. § 10505. After five years of experience with individual applications by non-carriers seeking to acquire marginal or failing lines by exemption from the filing requirements of Section 10901, the ICC in *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901*, 1 I.C.C.2d 810 (Dec. 19, 1985) ("*Ex Parte 392*") exempted the class of Section 10901 transactions involving

<sup>4</sup> Railco is a wholly owned subsidiary of Chicago West Pullman Transportation Corporation. Since it had not previously engaged in the rail business, Railco is treated by the ICC as a non-carrier.

<sup>5</sup> The Third Circuit erroneously believed that Section 10901(e) was the basis for the ICC's discretionary labor protection authority in sales of existing rail lines to non-carriers. 831 F.2d at 1235, n.6, App. A at A-8, n.6. Section 10901(e), however, only applies to the construction of new lines. The Third Circuit also seemed to doubt the existence of the ICC's labor protection authority under Section 10901(c)(1)(A)(ii), although it has been established by this Court since 1942. *ICC v. RLEA*, 315 U.S. 373 (1942) (interpreting predecessor statute to § 10901). 831 F.2d at 1235, n.6, App. A at A-8, n.6. The Third Circuit also erroneously claimed P&LE relied on 49 U.S.C. § 11347. *Id.*

non-carriers from such requirements. The ICC concluded that allowing non-carriers expeditiously to take over marginal lines, without protracted and costly regulatory proceedings, would improve the chances that these lines could be rehabilitated and remain part of the nation's rail system. Under the *Ex Parte 392* procedures, a new operator was authorized to acquire a line of railroad and commence operations seven days after it filed its Notice of Exemption with the ICC. 49 C.F.R. § 1150.32(b).<sup>6</sup>

RLEA participated fully in the ICC rulemaking proceedings that led to *Ex Parte 392*. RLEA there asked the ICC to exercise its discretion and automatically impose labor protective conditions on all transactions subject to the exemption. The ICC, however, concluded that the mechanical imposition of labor protective conditions on Section 10901 transactions was not in the public interest, would encourage the abandonment of rail lines, and would foreclose the revitalization of marginal lines. The ICC was willing to require protections in these transactions upon a showing of "exceptional" circumstances. The ICC also provided in *Ex Parte 392* that: "[a]ny affected party can file a petition to revoke under Section 10505(d) and attempt to show that regulation is necessary to carry out the rail transportation policy." 1 I.C.C.2d at 812. Thus, a union seeking to show circumstances warranting the imposition of labor protection could do so by filing a petition to revoke. Rail labor and other interests appealed the ICC's *Ex*

<sup>6</sup> The ICC recently completed a review of its *Ex Parte 392* procedures and concluded that, although the rules were generally working well and have facilitated a highly beneficial growth in the number of short line and regional railroads, some minor adjustments were needed. *Ex Parte No. 392 (Sub-No. 1). Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901* (served February 29, 1988) at 1-2, 7. See 53 Fed. Reg. 5,981. The P&LE transaction would have qualified under the new procedures, except that more than the 7-day notice would have been required by Railco.

*Parte 392* procedures, which were affirmed in all respects in *Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

## 2. P&LE's Sale to Railco

On September 19, 1987, Railco made its Notice of Exemption filing with the ICC, pursuant to *Ex Parte 392*. RLEA, on behalf of P&LE's unions, initially did not follow the ICC's petition to revoke procedures, but instead sought to reject Railco's exemption filing and a related exemption filing by Railco's parent, Chicago West Pullman Transportation Company ("CWPT"). RLEA also filed with the ICC a "Complaint for Cease and Desist Order and Other Relief." The thrust of these filings was that the sale of P&LE's rail assets to Railco did not qualify as a Section 10901 transaction, but was subject to ICA Section 11343, which requires the ICC to impose labor protective conditions on all parties to the transaction. Pending ICC action on its filings, RLEA asked the ICC to stay the effectiveness of Railco's and CWPT's exemption filings.

The ICC refused to stay or reject the exemption notices, which became effective September 26, 1987. As explained in its order served September 29, 1987 in Finance Docket Nos. 31121, 31122 and 31126, *P&LE Railco, Inc. -- Exemption Acquisition and Operation -- Lines of The Pittsburgh and Lake Erie R.R. Co. and The Youngstown and Southern Ry. Co.* (reprinted in App. E), the ICC found that RLEA was not likely to succeed on the merits and had failed to show it would suffer irreparable harm in the absence of a stay. Conversely, the ICC found that a stay of the transaction would harm P&LE's rail operations and shippers:

A stay would likely harm applicant and the shippers it intends to serve. It would delay the

start of applicant's operations, and would disrupt the planned transition between P&LE's and Railco's service. P&LE's operations are marginal at best. It has lost \$60 million in the past few years. It is unclear whether or how long it can continue operations. . . . In addition, the proposed sale of the P&LE to Railco has triggered substantial labor unrest including a strike on the line. A grant of the requested stay would prolong the uncertainty surrounding the fate of the P&LE and also prolong the controversy and attendant disruption in rail service surrounding the sale.

*Id.* at 4. The ICC therefore found that "[t]he public interest does not support a grant of a stay." *Id.* The ICC specified that RLEA should raise its concerns through a petition to revoke as provided by *Ex Parte* 392 and was given 30 days in which to file any petition to revoke. *Id.* at 3.

Immediately thereafter, on October 2, 1987, RLEA filed with the ICC a petition to revoke the exemptions granted to Railco and its parent, CWPT. Rather than ask for the imposition of discretionary labor protections, RLEA sought to block the sale altogether, arguing that P&LE was insolvent and that, as an alternative to the sale to Railco, the ICC should require the purchase of P&LE's rail assets by its employees through an ESOP. RLEA simultaneously asked the ICC to reconsider and stay consummation of the sale while its ESOP proposal was considered. In an order served October 19, 1987, the ICC denied RLEA's petition for reconsideration, but required P&LE to retain its corporate existence until after the ICC completed review of the petition to revoke. Finance Docket Nos. 31121 and 31122, *P&LE Railco, Inc. -- Exemption Acquisition and Operation -- Lines of*

*The Pittsburgh and Lake Erie R.R. Co. and The Youngstown and Southern Ry. Co.*, reprinted at App. F. RLEA's Petition to Revoke and Complaint are still pending before the ICC.

### The Strike Injunction

Although all regulatory approvals were in place, the sale could not be consummated, because of RLEA's continuing strike of the P&LE. After the ICC's rulings, P&LE renewed its efforts to enjoin the strike.<sup>7</sup> P&LE argued that the RLA, ICA and NLGA had to be read together, the strike violated the ICA, because the ICC's exclusive jurisdiction replaced any RLA effects bargaining obligation; and the strike violated the RLA, because RLEA was seeking to compel bargaining over non-mandatory subjects and because the status quo within the meaning of the RLA permitted the sale. The District Court issued a preliminary injunction against the strike on October 8, 1987, solely on the ground that it frustrated the ICC's order approving the sale. App. B. The District Court held that the ICC authorization of the sale relieved P&LE of any duty to bargain with its unions over the effects of the sale, and that the NLGA must be accommodated to the ICA. App. B, Conclusions ¶¶ 4-6, 8. The District Court found that the strike curtailed P&LE's operations, caused substantial injury to P&LE, and was intended to, and had in fact, frustrated the planned sale to Railco. App. B, Findings ¶¶ 24-28.

RLEA immediately petitioned the Third Circuit for summary reversal or a stay pending appeal of the District Court's order enjoining the strike. *RLEA v. P&LE*, No. 87-3664. On

<sup>7</sup> On September 21, 1987, before any ICC filings had been made by Railco, the District Court denied P&LE's application for a restraining order, finding that, although P&LE had no duty to bargain about its decision to go out of business, it must bargain about the effects of the sale, pursuant to Section 6 of the RLA.

October 26, 1987, the Third Circuit granted summary reversal on the narrow ground that the NLGA should not be accommodated to the ICA and the District Court therefore lacked jurisdiction to enjoin the strike. 831 F.2d at 1237, App. A at A-13. The Court expressly declined to consider whether the strike violated the RLA and therefore could be enjoined on that basis. It also refused to review the District Court's holding that the ICC's orders relieved P&LE of any duty to bargain with its unions about the effects of the sale.<sup>8</sup> *Id.* at 1233, 1237, App. A at A-4, A-13.

Once the Third Circuit reversed the District Court's order enjoining RLEA's strike, RLEA indicated that it would immediately renew its strike if any action were taken to consummate a sale.

#### Decision on Remand

The Third Circuit remanded the case to the District Court for a determination as to whether the strike could be enjoined as a violation of the RLA. While this petition is premised on developments up to the Third Circuit's decision in No. 87-3664, the Court should know that, on remand, the District Court reversed its prior holding that the ICC's jurisdiction over the sale relieved P&LE of any RLA duty to bargain over the effects of the sale on employees. It then enjoined P&LE from selling the railroad until it completed the "long and drawn out" bargaining and mediation procedures of the RLA. The Court held that P&LE could consummate the sale prior to exhaustion of the RLA's bargaining and

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<sup>8</sup> P&LE had in fact engaged in permissive effects bargaining with its unions, meeting on September 18, 19, 23 and 25 and October 7 and 9, 1987 (without prejudice to its position that it had no mandatory duty to exhaust the processes of the RLA as to the effects of the sale prior to its consummation) in an effort to reach an agreement addressing the effects of the sale.

mediation procedures, only if the prospective buyer agreed to take all of P&LE's employees, its unions, its collective bargaining agreements, and its RLA bargaining obligations. P&LE took an emergency appeal from that decision, which the Third Circuit agreed to review on an expedited basis. *RLEA v. P&LE*, No. 87-3797. Oral argument was heard on January 8, 1988, with the Third Circuit promising an expedited decision. P&LE obtained the maximum extension of time permitted by 28 U.S.C. § 2101(c) for filing the instant petition for certiorari expecting that the Third Circuit's second decision would issue in time to be joined with this petition, either by P&LE or RLEA depending on its outcome.

As it turned out, the Third Circuit has not yet ruled in No. 87-3797. While, if the Third Circuit had, it may have made sense for any petitions for certiorari from the two decisions (Nos. 87-3664 and 87-3797) to be filed together, this Court can and, P&LE respectfully submits, should grant certiorari of No. 87-3664 on a stand-alone basis. That Third Circuit decision presents a discrete issue which can be reviewed separately from other issues. Moreover, as explained *infra*, the issue of whether the NLGA must be accommodated to the ICA to permit ICC-authorized transactions to be consummated is of immediate significance to the entire railroad industry. Furthermore, P&LE needs some indication, sooner rather than later, given its precarious financial condition, whether, under the law, its only options truly are to liquidate, file for bankruptcy, or submit to the demands to sell to its unions or a purchaser approved by all of its unions.

## REASONS FOR GRANTING THE WRIT

### A. This Case Raises the Question of Whether One Party to ICC Proceedings -- Rail Labor -- May Use Its Strike Weapon to Frustrate National Transportation Policy

This case generally concerns the ICC's exclusive and plenary authority to regulate the sale of rail lines and to balance and protect the interests of all parties in implementing the national railroad transportation policy. Specifically, this case concerns the ability of organized labor to participate as a party in ICC proceedings and, if dissatisfied with the results, to strike in an effort to compel the result of its choosing and in so doing frustrate the jurisdiction of the ICC. Thus, this appeal presents a vital issue of first impression in this Court -- whether a district court may enjoin a strike whose sole purpose is the frustration of an ICC-approved transaction.

The ICC, which is charged with administering national rail transportation policy, has determined that discretionary labor protective conditions generally should not be imposed in sales of marginal or failing rail lines to new carriers, absent a showing of exceptional circumstances. The ICC has found that, since it adopted this policy, "[n]ew railroad formation quickened, abandonments fell, service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved." Finance Docket No. 31205, *FRVR Corporation -- Exemption Acquisition and Operation -- Certain Lines of Chicago and North Western Transportation Co. -- Petition for Clarification* (served Jan. 29, 1988) at 3 (footnotes omitted) ("*FRVR*").

Organized rail labor initially challenged this policy by participating in ICC proceedings and then taking direct appeals to

the courts of appeals, which upheld the ICC's exercise of its discretionary conditioning authority. See, e.g., *RLEA v. ICC*, 819 F.2d 1172 (D.C. Cir. 1987); *RLEA v. United States*, 791 F.2d 994 (2d Cir. 1986). Rail labor, through the RLEA and individual unions, also participated in the *Ex Parte* 392 rulemaking and took an appeal from that order.

When the ICC's application of its authority was being judicially upheld, rail labor, through the RLEA, began petitioning Congress to amend the ICA to require the imposition of labor protections in all transactions subject to Section 10901. See, e.g., Railroad Transportation Policy Act of 1979: *Hearings on S. 1946 before the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 536, 544 (1979) (testimony of J.R. Snyder, Chairman, Legis. Comm., RLEA); H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 250 (1986). Congress has not done so.

Rail labor then tried to attack collaterally the ICC's policy by serving Section 6 notices invoking the RLA's "purposefully long and drawn out"<sup>9</sup> "major dispute" procedures and by bringing actions in the district courts claiming that such ICC-authorized sales violated the RLA's status quo and bargaining requirements. With the exception of the District Court's decision on remand in this action, every court has held that such actions were improper attempts to evade the ICC's jurisdiction. *RLEA v. Staten Island R.R. Corp.*, 792 F.2d 7 (2d Cir. 1986), cert. denied, 107 S.Ct. 927 (1987); *Chicago & North Western Transportation Co. v. RLEA*, No. 88-CO444 (N.D. Ill. March 16, 1988); *RLEA v. City of Galveston*, No. G-87-359 (S.D. Tex. Nov. 4, 1987); *Decker v. CSX*

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<sup>9</sup> *Brotherhood of Ry. and Steamship Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 245 (1966).

*Transportation, Inc.*, 672 F. Supp. 674 (W.D.N.Y. 1987); *United Transportation Union v. Burlington Northern R.R. Co.*, No. CV 87-73-H-CCL (D.Mont. Oct. 29, 1987); *Burlington Northern R.R. Co. v. United Transportation Union*, No. 86-5015-CV-SW-O (W.D. Mo. Aug. 29, 1986); *RLEA v. Chicago & Northwestern Transportation Co.*, 124 L.R.R.M. 2715, 2720 (D. Minn. 1986), *appeal pending*, No. 87-5071-MN (8th Cir. arg. Dec. 18, 1987).<sup>10</sup>

In this case RLEA tried out a new strategy; RLEA struck the selling carrier and invoked the NLGA to shield its behavior. The Third Circuit's hasty<sup>11</sup> treatment of the issues led it to an erroneous result. In so doing, the Third Circuit has single-handedly halted the revitalization of the railroad industry by allowing rail labor the ultimate veto -- the right to strike over an ICC order. Since the *P&LE* decision, rail labor has moved quickly to block other transactions authorized under *Ex Parte* 392 by threatening to strike or actually striking. See *Chicago & Northwestern Transportation Co. v. RLEA*, No. 88-CO444 (N.D. Ill. March 16, 1988); *Burlington Northern R.R. Co. v. United Transportation Union*, No. 86-5013-CV-SW-8 (W.D. Mo. Nov. 16, 1987), *appeal pending*, No. 87-2581 (8th Cir. arg. Dec. 15, 1987); *RLEA v. City of Galveston*, No. G-87-359 (S.D. Texas Nov. 4, 1987); *Atchison, Topeka & Santa Fe Ry. Co. v. RLEA*, No. 87-C-9847 (N.D. Ill. 1987); *CSX Transportation, Inc.*

<sup>10</sup> Similarly, labor's collateral attacks on transactions where the ICC imposed mandatory labor protections were also rejected. See *RLEA v. Guilford Transportation Industries, Inc.*, 667 F. Supp. 29 (D. Me. 1987), *aff'd per curiam*, No. 87-1774 (1st Cir. 1988); *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir.), *cert. denied*, 107 S.Ct. 111 (1986).

<sup>11</sup> The District Court's October 8, 1987 order was summarily reversed by opinion issued October 26, 1987.

*v. United Transportation Union*, No. 87-1391C (W.D.N.Y. arg. March 4, 1988).

The ICC has described the impact of the Third Circuit's decision as follows:

This decision has had an immediate impact on the formation of small railroads, threatening to halt the revitalization of the marginal railroad sectors -- a restructuring that the Commission has found to be in the interest of carriers, labor, and the shipping public.

*FRVR* at 6. The ICC there found that the RLA and NLGA could not be used to frustrate its jurisdiction to authorize rail transactions.<sup>12</sup>

Resolution of the issue by this Court is critical to implementation and administration of the ICA and labor stability in the rail industry. Pursuant to that statute, the ICC has plenary jurisdiction over transportation by rail carrier, including the jurisdiction to approve rail line purchases, sales, consolidations, mergers, abandonments, construction, acquisitions and operations. See, e.g., 49 U.S.C. §§ 10901, 10903, 10904, 11343-45. These transactions will necessarily affect railway employment. For this reason, ICA mandatory policy considerations include the encouragement of fair wages and safe and suitable working conditions in the railroad industry, 49 U.S.C. § 10101a(12), and the ICC has been given comprehensive jurisdiction to address the labor impacts of

<sup>12</sup> The ICC moved to intervene in the *RLEA v. P&LE* proceedings at the appellate level. The Third Circuit granted the ICC leave to file as *amicus curiae* and to present oral argument in favor of *P&LE* and against *RLEA's* motion for summary reversal of the injunction. See 831 F.2d. at 1235, n.5, App. A at A-7, n.5.

every transaction it approves. *See, e.g.*, 49 U.S.C. §§ 10901(c), 10903(b), 11347. Today, rail labor is unhappy with the ICC's policy in *Ex Parte* 392. Tomorrow, it may be displeased with some other ICC decision or policy. If the Third Circuit is not reversed, rail labor, not the ICC, will become the final arbiter of railroad transportation policy.

**B. The Third Circuit's Decision Erroneously Applied  
and Is Inconsistent with Supreme Court Precedent**

In concluding that the District Court had no jurisdiction to grant an injunction in this case, the decision below relied heavily on two Supreme Court decisions applying the NLGA. *See* 831 F.2d at 1236, App. A at A-9--A-10, citing *Order of R.R. Telegraphers v. Chicago & North Western Ry. Co.*, 362 U.S. 330, *reh'g denied*, 362 U.S. 984 (1960) ("*Telegraphers*"); *id.* 1237, App. A at A-12, citing *Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 107 S.Ct. 1841 (1987) ("*BN v. BMWE*"). The Third Circuit's application of those cases was misplaced.

The *Telegraphers* case was cited as rejecting arguments "comparable to those made by P&LE" in this case, in refusing to enjoin a strike in response to a railroad's decision to close certain railroad stations. 831 F.2d at 1236, App. A at A-9. The Third Circuit found the case comparable to this one, because the station closings were sanctioned by state public utilities "pursuant to the Interstate Commerce Act." *Id.* On this point, the Third Circuit is simply wrong. The station closings in *Telegraphers* did not

require or receive ICC approval.<sup>13</sup> Moreover, there was no indication that the state agencies had authority to require labor protective conditions. Similarly, *BN v. BMWE* did not in any way involve the exercise of ICC jurisdiction. Thus, neither *Telegraphers* nor *BN v. BMWE* addressed the question of enjoining a strike that is meant to frustrate a specific ICC-approved transaction. The railroad in *Telegraphers* did not argue that the strike would conflict with an ICC approval order, but rather made the broad argument that bargaining with rail labor over the operation of unnecessary and uneconomical stations would run counter to the general Congressional policy, embodied in the ICA, of promoting an efficient national railroad system. *Id.* at 342. The only conflict with the ICA alleged by the railroads in *BN v. BMWE*, was that a strike interfered with the railroads' general duty to operate as a common carrier. The railroads in *Telegraphers* and *BN v. BMWE* therefore sought a sweeping accommodation of NLGA to the ICA. Such a broad accommodation would not have been an accommodation at all, but an obliteration of NLGA's anti-injunction provisions. On the other hand, the Third Circuit goes to the other, equally untenable extreme, holding that NLGA is never accommodated to the ICA, even though there is an obvious clash between the Congressional purposes of the ICA and NLGA in this case.

The Third Circuit's decision was also contrary to long-standing decisions by this Court recognizing that the ICC's authority to address labor disputes arising from its approvals was necessary to avoid strikes and ensure that transactions would be

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<sup>13</sup> At the time, certain states required railroads to seek approval before closing stations, and this Court expressly declined to decide whether a strike over a state-approved station closing could be enjoined, *see Telegraphers* 362 U.S. at 340, n.16.

consummated. For this reason, prior to the first enactment of express statutory authorization for mandatory labor protections (now found in 49 U.S.C. § 11347), the Supreme Court agreed with RLEA that the ICC had the power to impose labor protections on a discretionary basis in mergers and consolidations. *United States v. Lowden*, 308 U.S. 225, 238 (1939). The Supreme Court there expressly acknowledged the interplay between ICC approvals of railroad consolidations and effects upon rail labor, noting that "the steps involved in carrying out the Congressional policy of railroad consolidation in such a manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress . . .," *id.* at 233, and that "[o]n several occasions strikes of railroad employees affected by consolidations of plant facilities have threatened." *Id.* at n.2. Following the same rationale as in *Lowden*, the Supreme Court subsequently held that the ICC's authority under the predecessor statute to Section 10901 included the authority to impose labor protections on a discretionary basis. *ICC v. RLEA*, 315 U.S. 373 (1942).

The Third Circuit's decision is also inconsistent with *Venner v. Michigan Central R.R.*, 271 U.S. 127, 130 (1926), where this Court disapproved collateral attacks on ICC orders. *See also*, e.g., *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir.), *cert. denied*, 107 S.Ct. 111 (1986) (citing *Venner*). RLEA's strike is in effect, and intention, a collateral attack on the ICC orders authorizing the immediate sale of P&LE's lines.

### C. The Third Circuit's Opinion Conflicts with Decisions in Other Circuits Faced with Similar Issues

While no other Court of Appeals has faced exactly the same issue raised by this case, the Third Circuit opinion is contrary to the rationale of the two circuit courts which have faced similar issues regarding accommodation between the ICA and NLGA. The Third Circuit relied heavily on *Texas & New Orleans R.R. Co. v. Brotherhood of R.R. Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952, *reh'g denied*, 375 U.S. 871 (1963) ("*Texas & New Orleans*") to support its refusal to sanction an injunction in this case. In *Texas & New Orleans*, the Fifth Circuit overturned an injunction of a strike directed at an ICC-approved transaction. Rather than supporting the Third Circuit's decision in this case, the Fifth Circuit in *Texas & New Orleans* expressly noted that, where there was a clash between the ICA and NLGA, it would in fact require an accommodation of the NLGA to the ICA and uphold a strike injunction: "[I]f it should be determined that the Commission's authority under section 5 (now 49 U.S.C. § 11343) is being frustrated by the application of Norris-LaGuardia to the present suit, we would have to conclude that Norris-LaGuardia was preempted . . . even though section 5 is not labor legislation." *Id.* at 158. Clearly, the ICC's jurisdiction has been frustrated in this case. After notice and opportunity for hearing by RLEA, the ICC determined that the sale of P&LE's lines should go forward expeditiously, without prior resolution of the question of labor protections. The District Court specifically found that "the strike is intended and has the effect of frustrating and avoiding the terms of the sale as approved by the ICC" -- a finding left undisturbed by the Third Circuit. App. B., Findings ¶ 27.

Just last term, this Court denied certiorari on an Eighth Circuit decision granting an injunction against a strike directed at frustrating an ICC-approved transaction. *Missouri Pacific R.R. Co. v. United Transportation Union*, 580 F. Supp. 1490 (E.D. Mo. 1984), *aff'd*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 3209 (1987) ("*Mopac*"). In *Mopac*, as in this case, the union claimed that the rail carrier had to first bargain pursuant to RLA procedures before implementing an ICC-approved transaction. When the carrier asserted that the ICC's jurisdiction controlled, the union threatened to strike. The *Mopac* district court concluded that "it is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings, and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired." 580 F. Supp. 1490, 1505 (E.D. Mo. 1984). The district court found that the NLGA had to be accommodated to the ICC's jurisdiction in these circumstances:

Congress gave the ICC exclusive and plenary authority to approve certain transactions which are in the public interest. In so doing, Congress specifically intended the ICC to authoritatively resolve labor disputes arising from rail consolidations "in order that economically desirable mergers not be obstructed."

*Id.*

The Eighth Circuit upheld the injunction issued in *Mopac*, specifically discussing the accommodation necessary between NLGA and the ICA's jurisdictional grant to the ICC and approving the district court's reasoning. 782 F.2d at 111-12. Recognizing that the ICC had the authority to approve the terms of the consol-

ation transaction, including the effects on working conditions, the Eighth Circuit confirmed that allowing a union to strike in an attempt to impose different conditions "would be tantamount to saying that [the union] has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC." *Id.* Thus, the NLGA anti-injunction provisions must be "inapplicable to ICC-resolved, consolidation-related labor disputes." *Id.*

The Third Circuit attempted to distinguish the *Mopac* decision on the basis that the transaction in *Mopac* was subject to 49 U.S.C. § 11341(a), which exempts transactions from the requirements of other laws, and because the ICC imposed labor protective conditions in that case. See 831 F.2d at 1237, n.8, App. A at A-12, n.8. However, because the ICC's jurisdiction both to approve a Section 10901 line sale and a merger subject to Section 11341 is exclusive, a strike to block a Section 10901 transaction is equally contrary to the Congressional grant of exclusive and plenary ICC jurisdiction. Moreover, whether the ICC actually imposes labor protections is not the relevant criterion; the relevant inquiry is whether the ICC has authority to impose protections. As the ICC noted in *FRVR*, its "[j]urisdiction is not determined by outcome." Slip op. at 8. In any event, a close reading of the Third Circuit's opinion shows it would find no accommodation of the NLGA even where the ICC imposes mandatory protective conditions. 831 F.2d at 1236, 1237, n.7, App. A at A-12, n.7.

Thus, the Third Circuit's opinion in this action conflicts with the ICC's interpretation of its organic statute and the *Mopac* and *Texas & New Orleans* decisions, where the Eighth and Fifth Circuits, respectively, found that the NLGA must be accommodated to permit the injunction of a strike designed to prevent an ICC-approved transaction.

**D. The Third Circuit Erroneously Refused to Accommodate the NLGA with the ICC's Jurisdiction to Resolve Disputes Over Labor Protection**

The Third Circuit's refusal to accommodate the NLGA in this case is based upon its erroneous conclusion that the ICA's authority over labor protection was not "adopted as a part of a pattern of labor legislation." See 831 F.2d at 1234-36, App. A at A-6, A-9.

As a threshold matter, while *dicta* in this Court's decisions has been read to require accommodation only to other federal labor law, this Court has never so held. P&LE submits that the correct analysis, as in any case of conflict between two federal statutes, is to consider the Congressional purposes of both. See, e.g., *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). In fact, NLGA has been accommodated to non-labor law in order to effectuate Congressional intent. See *McGuire Shaft & Tunnel Corp. v. Local Union No. 1791*, 475 F.2d 1209, 1214-15 (Em. Ct. App.), *cert. denied*, 412 U.S. 958 (1973) (Economic Stabilization Act).

Even accepting *arguendo* the Third Circuit's restrictive interpretation of NLGA accommodation, the NLGA must still be accommodated in this instance. For example, in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), the Court noted that, in accommodating NLGA to the Labor Management Relations Act, the courts must recognize the Congressional concern in promoting both collective bargaining and "administrative techniques for the peaceful resolution of industrial disputes." 398 U.S. at 251. The ICC's comprehensive labor protection authority is such an "administrative technique" for peaceful resolution of disputes concerning whether and what level of labor protection

benefits should be required in ICC-regulated transactions for affected employees. As previously discussed, the ICA requires the ICC to consider the effects on rail labor. In the first instance, the ICC, after comment by the parties, determines whether to require labor protections and, if so, what level. For example, RLEA had the opportunity to participate in the formulation of *Ex Parte 392*. Although the ICC there decided in *Ex Parte 392* not to automatically impose labor protections on all sales of marginal lines to new operators, the ICC did give rail labor the right in any particular case to show that labor protections were nonetheless warranted, by filing a petition to revoke. 1 I.C.C.2d at 815. If dissatisfied with the level of labor protections imposed by the ICC, rail labor can appeal the ICC's decision to the Court of Appeals. RLEA in fact appealed *Ex Parte 392*, which was affirmed. *Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987). If dissatisfied with the ICC's action on a petition for labor protections in a particular case, rail labor also has the right of appeal. See, e.g., *RLEA v. United States*, 811 F.2d 1327 (9th Cir. 1987). If the ICC imposes labor protective conditions, as part of those conditions, it establishes a procedure for the arbitration of any disputes over the interpretation and application of those benefits. See, e.g., *New York Dock Ry. -- Control -- Brooklyn East. Dist. Terminal*, 360 I.C.C. 60, 87 (Appendix III, Art. I, ¶ 11), *aff'd*, *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). Again, labor has the right to appeal an arbitration award, first to the ICC and then to the Court of Appeals. *United Transportation Union v. Norfolk & Western Ry. Co.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 700 (1988).

Similarly, in *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 41, *reh'g denied*, 353 U.S. 948 (1957), relied upon by the Third Circuit, this Court

accommodated NLGA to the RLA's minor dispute procedures, on the basis that those procedures were "not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative." Congress has provided labor a "reasonable alternative" to seek labor protections in ICC-regulated transactions through the above described ICC administrative process with the right of appellate review.

An undercurrent of the Third Circuit's decision, however, is a dissatisfaction with the ICC's *Ex Parte* 392 procedures. The Third Circuit noted that the burden was on a protestor to file a petition to revoke and that the ICC had never granted labor protections as a result of a petition to revoke. The Third Circuit also quoted language from *Texas & New Orleans* that the ICA provided rail labor "a small voice of protest." 831 F.2d at 1235, 1237, App. A at A-12. Imagined shortcomings in *Ex Parte* 392 procedures are no basis for a court to find a right for unions to strike. Moreover, those procedures have been judicially affirmed. They do not single out rail labor for special treatment; any party, labor or non-labor, seeking modification of an *Ex Parte* 392 transaction must do so through a petition to revoke. The fact that relief is after-the-fact also does not render the procedures inadequate. Indeed, under the RLA's minor dispute procedures, which were the subject of *Chicago River*, the carrier is allowed to act first while any grievance is arbitrated. See, e.g., *Empresa Ecuatoriana de Aviacion v. District Lodge No. 100*, 690 F.2d 838, 894, reh'g denied, 696 F.2d 1007 (11th Cir. 1982), cert. dismissed, 463 U.S. 1250 (1983). Furthermore, if the ICC's denial of a revocation petition in a particular case was improper, the correct remedy, provided by statute, 28 U.S.C. § 2821, is appellate review of the ICC order, not a collateral attack by strike on the ICC's jurisdiction. In addition, RLEA is in no position to complain

about ICC procedures, because it has chosen not even to seek discretionary labor protections in its revocation petition filed in the P&LE ICC proceedings.

The Third Circuit's evident conclusion that rail labor has a "small voice of protest" under the ICA is completely unfounded. In ICC proceedings, RLEA has no lesser, or greater, voice than all the other competing interests subject to the ICC's jurisdiction. Rail labor, principally through the RLEA, has in fact long been instrumental in the amendment of the ICA to expand the ICC's labor protection authorities, which are unprecedented in any other industry.<sup>14</sup> As the ICC noted in *FRVR*, slip op. at 7-8:

From the 1930's, when the ICC actively became involved in the administration of labor protection, Congress has routinely affirmed and expanded the importance of the Interstate Commerce Act as a part of the complex of laws governing labor relations in the rail industry . . . For more than fifty years the Commission has exercised its authority in this field, frequently at the request and

<sup>14</sup> For example, rail labor had a strong voice in the amendment of Section 5(2)(f) (now 49 U.S.C. § 11347), which was amended at the urging of rail labor to provide an increased level of mandatory labor protective conditions in railroad consolidation proceedings. See, e.g., *Railroads - 1975: Hearings on Legislation Relating to Rail Passenger Service before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 1104-07 (1975) (testimony of W.G. Mahoney, counsel to RLEA). At labor's urging, the ICA was also amended to make the imposition of labor protective conditions in abandonments mandatory rather than discretionary. Pub. L. No. 94-210, § 802 (1976) (amending 49 U.S.C. § 1a(4), recodified at 49 U.S.C. § 10903(b)(2)). See *Railroad Revitalization: Hearings on H.R. 6351 and H.R. 7681 Before the Subcomm. on Transp. and Commerce of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 382 (1975) (testimony of C.J. Chamberlain, Chrmn. RLEA) and at 594 (testimony of C.L. Dennis, Int'l President, Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers & Station Employees).

with the support of labor, and our decisions have had enormous impact on the shape of rail labor relations throughout this period.

Similarly, the *Mopac* district court held "because the ICC has jurisdiction over labor disputes in connection with consolidation proceedings, excepting the NLGA in the case at bar does not result in a great departure from established doctrine," citing this Court's *Chicago River* decision as supporting its holding. 580 F. Supp. at 1506.

Finally, accommodation of NLGA to the ICA in this case does no violence to the purpose of NLGA -- protection of employees' rights to use economic pressure to achieve changes in working conditions -- because here P&LE's unions and RLEA were not acting as labor unions, but as another would-be purchaser interested in acquiring P&LE's lines. The NLGA was not designed to allow RLEA to run-off other purchasers through strike activity so it would be the only purchaser left. Cf. *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945).

Thus, it was error for the Third Circuit to hold that the general NLGA could never be accommodated to the more specific purposes of the ICA. Cf. *Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 42 (1963).

## CONCLUSION

For the foregoing reasons, P&LE respectfully requests that the writ be issued as requested herein.

Respectfully submitted,

Richard L. Wyatt, Jr.  
Akin, Gump, Strauss, Hauer & Feld  
1333 New Hampshire Ave., N.W.  
Washington, D.C. 20036  
(202) 887-4000  
(Counsel of Record)

Ronald M. Johnson  
Mary Qualiana  
Donna M. DeSilva  
(Counsel for Petitioner)

G. Edward Yurcon  
The Pittsburgh & Lake Erie  
Railroad Company  
780 Commerce Court  
Four Station Square  
Pittsburgh, Pennsylvania 15219  
(412) 261-3201  
(Counsel for Petitioner)

Dated: March 24, 1988

## **APPENDIX**

A-1

**RAILWAY LABOR EXECUTIVES'  
ASSOCIATION, Appellant,**

**v.**

**PITTSBURGH & LAKE ERIE  
RAILROAD COMPANY.**

**No. 87-3664.**

United States Court of Appeals,  
Third Circuit.

Argued Oct. 21, 1987.

Decided Oct. 26, 1987.

John O'B. Clarke, Jr. (argued), Highsaw & Mahoney,  
Washington, D.C., for appellant.

Richard L. Wyatt, Jr. (argued), Akin, Gump, Strauss,  
Hauer & Feld, Washington, D.C., for appellee.

Clyde J. Hart, Jr. (argued), I.C.C., Washington, D.C., for  
amicus curiae I.C.C.

Before SLOVITER, BECKER and MANSMANN, Circuit  
Judges.

**OPINION OF THE COURT SUR  
MOTION FOR SUMMARY  
REVERSAL**

SLOVITER, Circuit Judge.

The district court entered an order on October 8, 1987  
enjoining the Railway Labor Executives' Association (RLEA), an  
association of the executive officers of nineteen railroad unions,

from proceeding with its strike against defendant Pittsburgh & Lake Erie Railroad Company (railroad or P & LE).<sup>1</sup> RLEA appeals from that order contending, *inter alia*, that the district court had no jurisdiction to issue the injunction because section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, has withdrawn jurisdiction from the federal courts to enjoin the strike activity involved in this case. Before us is the motion of RLEA to summarily reverse the district court or in the alternative to stay the injunction pending appeal, on which we have held expedited oral argument.

## I.

The following facts are not disputed for purposes of this appeal: P & LE has collective bargaining agreements with various labor organizations whose chief executive officers are members of RLEA. Some of these agreements contain provisions protecting the job security of certain covered employees for their working lives. On July 8, 1987, P & LE entered into an agreement to sell to P & LE Railco, Inc. (Railco), a newly-formed subsidiary of Chicago West Pullman Transportation Corporation, all of P & LE's rail lines and certain operating properties. The jobs of P & LE's approximately 750 employees would be affected by the sale because Railco intends to drop approximately 500 employees and does not intend to comply with or assume any of the existing labor agreements between P & LE and its unions.

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<sup>1</sup> The district court's order, although denominated a temporary restraining order, was in substance a preliminary injunction since it was issued after notice and a hearing, was not limited in time, and provided that it shall remain in effect until the court rules on the preliminary injunction for which no hearing has yet been scheduled. Accordingly, we have jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1). See *Professional Plan Examiners v. Lefante*, 750 F.2d 282, 287 (3d Cir. 1984); *San Francisco Real Estate Investors v. Real Estate Investment Trust*, 692 F.2d 814, 816 (1st Cir. 1982).

The unions were notified by P & LE on July 30, 1987 of the pending agreement, and promptly wrote to P & LE noting P & LE's failure to send notice under section 6 of the Railway Labor Act, 45 U.S.C. § 156, and requesting the railroad to bargain over, among other things, the effects of the transaction on its employees.<sup>2</sup> P & LE responded that the transaction is controlled by the Interstate Commerce Commission (ICC) and that section 6 bargaining would usurp the ICC's authority.

On August 19, 1987, RLEA filed a complaint in the United States District Court for the Western District of Pennsylvania against P & LE to enforce the employees' rights under the Railway Labor Act. RLEA sought a declaration that the provisions of the Railway Labor Act were applicable to this transaction, a declaration that the sale could not be consummated until all Railway Labor Act dispute resolution procedures have been exhausted, and an injunction prohibiting P & LE from completing the transaction until that time.

On September 15, 1987, the RLEA commenced a strike against P & LE. P & LE filed an answer to the complaint and a counterclaim seeking to enjoin the strike. The strike was temporarily halted by stipulation for a short period of time but continued thereafter. On September 21, 1987 the district court denied the railroad's request for a temporary restraining order against the strike, holding that such an injunction was precluded by section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, because the railroad had not complied with its obligation under

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<sup>2</sup> Under the Railway Labor Act, there can be no unilateral action which would change the terms and conditions of employment while the procedures of the Act are being followed. See 18H T. Kheel, *Business Organizations: Labor Law* § 50.05[1] at 50-24 (1986).

section 6 of the Railway Labor Act, 45 U.S.C. § 156, to give notice, bargain, and maintain the status quo.

On September 19, 1987 the purchasing company, Railco, filed a notice of exemption with the ICC pursuant to 49 C.F.R. § 1150.31. RLEA filed a petition for a stay, a petition for rejection of the notice of exemption, and a complaint seeking an order preventing consummation of the sale. The ICC denied the request for a stay on September 25, 1987. RLEA filed a petition for revocation, which is pending.

Following the ICC's action, P & LE filed a renewed motion for a temporary restraining order, and, after a hearing on October 8, 1987, the district court entered the injunction order which is the subject of this appeal.

In essence, the district court found that the strike substantially curtails the operations of P & LE, that it would cause P & LE's customers and employees to suffer irreparable harm, and that an injunction against the strike was warranted because, by approving the sale of P & LE's assets to Railco, "[t]he ICC, and the statutes and regulations under which it operates, has eliminated the effects of the sale upon P & LE employees as a legitimate consideration in the granting of injunctive relief." Transcript of October 8, 1987 at 77.

The RLEA appeals. Because we conclude that section 4 of the Norris-LaGuardia Act divests the district court of jurisdiction to enter the injunction of October 8, 1987, we will summarily reverse,<sup>3</sup> without considering RLEA's additional argument relying on section 8 of the Norris-LaGuardia Act.

<sup>3</sup> See Internal Operating Procedures of the Third Circuit, Chapter 17.

## II.

Under the mandate of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15, as revealed by the words of the statute, the unmistakably clear legislative history,<sup>4</sup> and a long line of Supreme Court cases, district courts lack the power to enjoin employees from exercising their right to strike. See, e.g., *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*, 457 U.S. 702, 708, 102 S.Ct. 2672, 2678, 73 L.Ed.2d 327 (1982); *Milk Wagon Drivers' Union Local No. 753 v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 101-03, 61 S.Ct. 122, 127-28, 85 L.Ed. 63 (1940).

Section 4 of the Act is explicit:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from . . .

(a) Ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104 (1982).

Notwithstanding this unambiguous language, the Supreme Court has, in certain limited circumstances, determined that there should be an "accommodation" of Section 4's seemingly blanket prohibition on the exercise of the district court's injunctive powers. For example, in *Boys Markets, Inc. v. Retail Clerk's Union Local 770*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199

<sup>4</sup> See H.R.Rep. No. 669, 72d Cong., 1st Sess. 7-8 (1932).

(1970), the Supreme Court held that a federal court is not precluded from enjoining a strike in breach of a collective bargaining agreement that contains a no-strike clause and a mandatory grievance adjustment or arbitration procedure. In light of the strong federal labor policy in favor of labor arbitration, the Court concluded that "the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy." *Id.* at 253, 90 S.Ct. at 1594.

P & LE argues, and the district court found, that the Norris-LaGuardia Act must be accommodated to the Interstate Commerce Act. However, the Norris-LaGuardia Act will be accommodated to another federal statute only if that statute irreconcilably conflicts with the command of the Norris-LaGuardia Act and such an accommodation is necessary to enforce some other overriding and equally clear federal labor policy.

A review of the development of the accommodation cases shows that they have focused on "the need to accommodate two statutes when both were adopted as a part of a pattern of labor legislation." *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R. Co.*, 353 U.S. 30, 42, 77 S.Ct. 635, 641, 1 L.Ed.2d 622 (1957). See e.g., *id.* at 39-42, 77 S.Ct. at 639-41 (plain language of Railway Labor Act requiring that "minor" disputes be submitted to arbitration and legislative history demonstrating Congressional intent that Railway Labor Act grievance procedure be construed as a compulsory substitute for employee's economic self-help require accommodation of Norris-LaGuardia Act's anti-injunction provision); *Brotherhood of Locomotive Engineers v. Louisville and Nashville R.R. Co.*, 373 U.S. 33, 41-42, 83 S.Ct. 1059, 1063-64, 10 L.Ed.2d 172 (1963) (procedure in Railway Labor Act for judicial review of monetary awards by National

Railroad Adjustment Board is integral part of Railway Labor Act grievance procedure which would be violated by a strike); *Chicago & North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570, 581-84 & n. 18, 91 S.Ct. 1731, 1737-39 n. 18, 29 L.Ed.2d 187 (1971) (union could be enjoined from striking if it failed to perform its obligations under the Railway Labor Act to "exert every reasonable effort to make and maintain agreements"; the "earlier, general provisions" of the Norris-LaGuardia Act must accommodate the "subsequent, more specific provisions" of the Railway Labor Act when they are in "irreconcilable conflict"). Cf. *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774-75, 72 S.Ct. 1022, 1025-26, 96 L.Ed. 1283 (1952) (union could be enjoined from racially discriminatory practices which are in violation of Railway Labor Act).

P & LE's argument, joined by the ICC as amicus curiae,<sup>5</sup> that the Interstate Commerce Act is comparable to the Railway Labor Act and that, therefore, the prohibitions of the Norris-LaGuardia Act must be accommodated to the ICC's actions, is unpersuasive. The Interstate Commerce Act, as amended, lists fifteen policies relevant to the regulation of the railroad industry. 49 U.S.C. § 10101a. These include allowing competition and the demand for services to establish reasonable rail transportation rates, minimizing the need for federal regulatory control, and promoting a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the ICC. 49 U.S.C. § 10101a(1), (2), (3). Among the other policies listed are encouragement and promotion of energy conservation, 49 U.S.C. § 10101a(15), and encouragement

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<sup>5</sup> The ICC filed a motion to intervene in this appeal. We granted it leave to file a brief as amicus curiae and to present oral argument.

of "fair wages and safe and suitable working conditions in the railroad industry." 49 U.S.C. § 10101a(12). Nothing in the statutory language suggests that this incidental reference to "fair wages" converts the regulatory scheme over rail transport into a labor law.

Pursuant to the Act, the ICC has been given authority to approve various transactions, including acquisitions, involving rail carriers. When there is a consolidation, merger or acquisition involving existing rail carriers, the ICC must impose certain employee protective provisions. 49 U.S.C. § 11347. However, it is P & LE's position, and the RLEA concedes for purposes of this appeal, that the P & LE sale is not governed by section 11347, but that the transaction falls within the ambit of 49 U.S.C. § 10901 covering the acquisition of a rail carrier's operation by a non-carrier. Section 10901 gives the ICC discretion to require the imposition of employee protective provisions, but does not make imposition of these provisions mandatory.<sup>6</sup> Compare 49 U.S.C. § 10901(e) ("Commission *may* require" labor protective provisions) (emphasis added) with 49 U.S.C. § 11347 ("Commission *shall* require" such provisions) (emphasis added). In fact, on December 19, 1985, the ICC adopted final rules exempting from regulation almost all acquisitions and operations under 49 U.S.C. § 10901, *Ex parte No. 392 (Sub-No.1)*, 1 I.C.C.2d

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<sup>6</sup> Section 10901(e) provides that "[t]he Commission *may* require any rail carrier proposing both to construct and operate a new railroad line to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected" by a decision to operate a new railroad line (emphasis added). The ICC has suggested that its authority to impose labor protection is not limited by the plain language of this section, but instead extends to any transaction covered by section 10901. See *Ex Parte No. 392 (Sub-No.1)*, 1 I.C.C.2d 810, 815 (1985), *review denied sub nom. Illinois Commerce Comm'n v. I.C.C.*, 817 F.2d 145 (D.C.Cir. 1987).

810 (1985), *review denied sub nom., Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C.Cir. 1987), thereby placing upon a protester the burden of filing a petition to revoke the exemption. The ICC stated that such revocation would be granted only in an "extraordinary case" by "an exceptional showing of circumstances" justifying the imposition of labor protection. *Ex Parte No. 392*, 1 I.C.C.2d at 815. No such revocation has been granted since the decision in *Ex Parte No. 392*. See *Central Michigan Ry. -- Acquisition and Operation*, ICC Finance Docket No. 31059, served September 4, 1987 (unpublished) (Dissenting opinion of Vice-Chairman Lamboley).

Neither 49 U.S.C. § 10901 nor 49 U.S.C. § 11347, the other provision relied on by P & LE which makes the ICC's authority "exclusive" with respect to combinations of carriers, contains any language which would suggest Congress intended to override the anti-injunction policy of section 4 of the Norris-LaGuardia Act by the Interstate Commerce Act. The ICC's authority to consider the incidental effect of the transaction on labor and its discretionary authority to require provisions that protect employees do not make the Interstate Commerce Act comparable to the Railway Labor Act, which contains a comprehensive scheme of alternative dispute resolution mechanisms. Neither the ICC nor P & LE have pointed to any language in the legislative history of any of the labor laws or the Interstate Commerce Act which suggests that the strong national policy embodied in the Norris-LaGuardia Act is to be subordinated to the ICC's authority to approve an acquisition of railroad property.

Arguments comparable to those made by P & LE were rejected by the Supreme Court in *Order of R.R. Telegraphers v. Chicago & Northwest Ry. Co.*, 362 U.S. 330, 80 S.Ct. 761, 4

L.Ed.2d 774 (1960). In that case, the Supreme Court held that the absolute prohibition of the Norris-LaGuardia Act against enjoining strikes growing out of any labor dispute deprived the district court of the jurisdiction to enjoin a strike that arose out of a railroad's decision to close several stations. Although the closings had been approved pursuant to the Interstate Commerce Act by the relevant state public utility commissions, and the railroad argued that the strike ran "counter to the congressional policy expressed in the Interstate Commerce Act to foster an efficient national railroad system," *id.* at 342, 80 S.Ct. at 767, the Court held controlling "other legislation . . . like the Railway Labor and Norris-LaGuardia Acts [where] Congress has acted on the assumption that collective bargaining by employees will also foster an efficient national railroad service." *Id.* The majority of the Court rejected the argument of Justice Whittaker, writing for four dissenters, that because Congress had given the ICC and the public utility commissions exclusive jurisdiction over the regulation of station closings, the issue was removed from the field of collective bargaining. The Court also rejected the argument (similar to that made by P & LE before us) that a failure to enjoin the strike could lead to "the financial debilitation" of the railroad. *Id.* at 342, 80 S.Ct. at 767. The Court made clear that such arguments must be addressed to Congress, and not to the courts which are obligated to follow the provisions of the Norris-LaGuardia Act. Significantly, at the time of the *Telegraphers* decision, section 5(2)(f) of the Act, the predecessor of 49 U.S.C. § 11347, provided that the Commission "require a fair and equitable arrangement to protect the interests of the railroad employees affected." Act of Sept. 18, 1940, ch. 722, Title I § 7, 54 Stat. 906-07 (repealed 1978); current version at 49 U.S.C. § 11347. (emphasis added).

The *Telegraphers* case was relied on by the Fifth Circuit in its decision holding that a district court had no jurisdiction to enjoin a strike protesting changes in working conditions that resulted from consolidation of certain operations of several railroads, even though the ICC had approved the transaction. See *Texas and New Orleans R.R. Co. v. Brotherhood of R.R. Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952, 83 S.Ct. 508, 9 L.Ed.2d 500 (1963). Judge Rives, writing for the court, explained, in reasoning we find applicable and persuasive, that the Interstate Commerce Act is not one of those rare statutes to which the Norris-LaGuardia Act must be accommodated. Such an accommodation need only be made "where Congress, through such detailed legislation as the Railway Labor Act and Taft Hartley Act, 29 U.S.C. § 141 *et seq.*, has 'channelled these economic forces [capital and labor] . . . into special processes intended to compromise them' [*Brotherhood of R.R. Trainmen v. Chicago River & Indiana Ry. Co.*] (353 U.S. at 41, 77 S.Ct. at 640) and where these processes would be frustrated without injunctive aid." 307 F.2d at 157 (ellipsis and first brackets in original). The court continued:

The types of special processes which the courts have enforced with injunctive relief have all involved extensive negotiations and bargaining between the parties, or agreements which result from such bargaining; never processes which allow management to unilaterally choose a change in working conditions and give the union a small voice of protest if the change is unfair or inequitable.

*Id.* at 158. This language is directly applicable here, since, in the absence of any provision requiring "extensive negotiations and bargaining," RLEA and the employees it represents would be

relegated to "a small voice of protest" without the possibility of either negotiation or economic self-help.<sup>7</sup>

Just last Term the Supreme Court reiterated the Norris-LaGuardia Act policy barring judicial intervention in labor disputes. In *Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employees*, \_\_\_ U.S. \_\_\_, 107 S.Ct. 1841, 95 L.Ed.2d 381 (1987), the Court unanimously held that the district court has no jurisdiction to enjoin a strike against a railroad which took place after the parties exhausted the settlement procedure mandated by the Railway Labor Act. The Court declined to narrow the definition of "labor dispute" in the Norris-LaGuardia Act, and reaffirmed that "the legislative history leaves no doubt that Congress intended the Norris-LaGuardia Act to cover the railroads." *Id.* at 1848. It viewed Congress' policy expressed in the Norris-LaGuardia Act as inconsistent with a narrow construction of the statute and left it to Congress to restore federal court power to enjoin strikes and picketing if it so chooses. *Id.* at 1849-50, 1855.<sup>8</sup>

<sup>7</sup> It is noteworthy that in *Texas and New Orleans R.R.*, the court held the strike could be maintained even though the ICC had issued certain labor protective provisions, 307 F.2d at 154.

<sup>8</sup> The district court relied on *Missouri Pacific R.R. Co. v. United Transp. Union*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, \_\_\_ U.S. \_\_\_, 107 S.Ct. 3209, 96 L.Ed.2d 696 (1987), where the court held that because of ICC approval of a rail consolidation it could enjoin a strike over the employer's refusal to bargain over the effects of that transaction. That decision is distinguishable.

First, the statutory exemption relied on by the Eighth Circuit (a "carrier, corporation, or person participating in [an] approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction," 49 U.S.C. § 11341(a)) applies only to transactions "approved by or exempted by the Commission under this subchapter." (emphasis added). "[T]his subchapter" refers to Subchapter III of Chapter 113 of the Interstate Commerce Act, §§ 11341-51, under which the transaction in *Missouri Pacific* was approved, and

We are, of course, cognizant that a strike will cause economic hardship to the railroad, its shippers, and the community. Such harm is a consequence of the congressional policy leaving resolution of disputes to economic self-help by the parties. We intimate no view as to whether the provisions of the Railway Labor Act are applicable to this dispute so that the district court would be entitled to enjoin the strike while that Act's dispute resolution mechanisms are underway. RLEA's complaint seeking a declaration that the Railway Labor Act is applicable to this dispute is the merits issue before the district court. The only issue before us is the jurisdiction of the district court to issue the order of October 8, 1987.

Because we have concluded that the district court was without jurisdiction to enter an injunction, we will reverse that order and remand this case for further proceedings.

not to 49 U.S.C. § 10901, Subchapter I of Chapter 109 of the Act, applicable here.

Second, the Eighth Circuit itself noted that "[a]ffected employees are not left out in the cold, because § 11347 requires the ICC to impose employee protective conditions." *Missouri Pacific*, 782 F.2d at 112 (affirming and quoting the district court's opinion, 580 F.Supp. 1490, 1505-06) (emphasis added). However, as noted in the text, there is no such requirement under 49 U.S.C. § 10901(e).

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' )	
ASSOCIATION, )	
	)
Plaintiff, )	
	)
vs. )	Civil Action No. 87-1745
	)
PITTSBURGH AND LAKE ERIE )	
RAILROAD COMPANY )	
	)
Defendant. )	

FINDINGS OF FACT

1. PLAINTIFF, RAILWAY LABOR EXECUTIVES' ASSOCIATION (RLEA) IS AN UNINCORPORATED ASSOCIATION OF THE CHIEF EXECUTIVE OFFICERS OF 19 LABOR ORGANIZATIONS WHICH ARE "REPRESENTATIVES" AS THAT TERM IS DEFINED IN SECTION 1, SIXTH, OF THE RAILWAY LABOR ACT (RLA), 45 U.S.C. § 151, SIXTH.

2. DEFENDANT, PITTSBURGH AND LAKE ERIE RAILROAD COMPANY (P&LE) IS A RAIL CARRIER WITHIN THE MEANING OF SECTION 1, FIRST, OF THE RLA, 45 U.S.C. § 151, FIRST.

3. P&LE OWNS AND OPERATES A 182 MILE RAIL LINE WHICH RUNS FROM CONNELLSVILLE, PENNSYLVANIA, TO YOUNGSTOWN, OHIO.

4. VARIOUS LABOR ORGANIZATIONS WHOSE CHIEF EXECUTIVE OFFICERS ARE MEMBERS OF RLEA HAVE COLLECTIVE BARGAINING AGREEMENTS WITH P&LE WHICH COVER VARIOUS CRAFTS AND CLASSES OF P&LE EMPLOYEES.

5. ON JULY 8, 1987, P&LE ENTERED INTO A SALES AGREEMENT WITH P&LE RAILCO, INC., A SUBSIDIARY OF CHICAGO WEST PULLMAN TRANSPORTATION CORPORATION; WHEN FINALIZED, SAID AGREEMENT WOULD RESULT IN P&LE RAILCO'S PURCHASE OF ALL OF P&LE RAIL LINES AND CERTAIN OPERATING PROPERTIES.

6. BY LETTER DATED JULY 31, 1987, GORDEN E. NEUENSCHWANDER, PRESIDENT AND CHIEF EXECUTIVE OFFICER OF P&LE, NOTIFIED P&LE EMPLOYEES THAT IT HAD REACHED THE AFORESAID SALES AGREEMENT.

7. P&LE EMPLOYS APPROXIMATELY 750 PEOPLE WHOSE JOBS WILL BE AFFECTED BY THE SALE.

8. P&LE RAILCO DOES NOT INTEND TO OPERATE WITH 750 EMPLOYEES AND DOES NOT INTEND TO COMPLY WITH OR ASSUME ANY OF THE EXISTING LABOR AGREEMENTS BETWEEN P&LE AND ITS UNIONS.

9. CERTAIN OF THE COLLECTIVE BARGAINING AGREEMENTS EXISTING BETWEEN P&LE AND ITS UNIONS PROVIDE FOR JOB SECURITY, I.E., A LIFETIME GUARANTEE OF EMPLOYMENT WITH P&LE.

10. ON OR ABOUT AUGUST 7, 1987, P&LE WAS INFORMED BY A REPRESENTATIVE OF ITS EMPLOYEES' UNIONS THAT P&LE'S PROPOSED SALE OF ITS OPERAT-

ING PROPERTIES AND OTHER ASSETS WOULD HAVE AN EFFECT UPON THE WORKING CONDITIONS OF P&LE EMPLOYEES.

11. RLEA TOOK THE POSITION THAT THE SALES TRANSACTION COULD NOT BE EFFECTED WITHOUT COMPLIANCE WITH PROVISIONS OF THE RAILWAY LABOR ACT, 45 U.S.C. § 151, ET SEQ., REGARDING NOTICE, NEGOTIATIONS AND MAINTENANCE OF THE STATUS QUO PENDING COMPLETION OF RAILWAY LABOR ACT PROCEDURES.

12. P&LE RESPONDED THAT IT WAS WILLING TO MEET WITH THE RAIL UNIONS TO DISCUSS THE ANTICIPATED SALE; HOWEVER, P&LE TOOK THE POSITION THAT UNDER THE RAILWAY LABOR ACT IT HAD NO DUTY TO NEGOTIATE CONCERNING THE FACT OR EFFECTS OF THIS SALE.

13. COMMENCING AT APPROXIMATELY 9:00 P.M. (EDT) ON SEPTEMBER 15, 1987, THE RLEA COMMENCED A STRIKE AGAINST THE P&LE.

14. AS A RESULT OF A STIPULATION DATED SEPTEMBER 17, 1987, BETWEEN RLEA AND P&LE, THE STRIKE WAS TEMPORARILY HALTED; THE STIPULATION CEASED TO HAVE EFFECT AS OF 5:00 P.M. (EDT), SEPTEMBER 19, 1987, AND THE RLEA RESUMED THE STRIKE, WHICH HAS CONTINUED TO DATE.

15. THE SALE OF P&LE'S ASSETS TO P&LE RAILCO IS SUBJECT TO THE APPROVAL OF THE INTER-STATE COMMERCE COMMISSION (ICC) PURSUANT TO

THE INTERSTATE COMMERCE ACT, 49 U.S.C. § 10101, ET SEQ.

16. IN APPROVING TRANSACTIONS SUCH AS THE SALE OF P&LE'S ASSETS, THE ICC HAS THE AUTHORITY TO IMPOSE LABOR PROTECTIVE PROVISIONS PURSUANT TO 49 U.S.C. § 10901.

17. THE ICC HAS THE AUTHORITY TO EXEMPT CERTAIN TRANSACTIONS CONCERNING RAILROADS FROM THE PROVISIONS OF THE INTERSTATE COMMERCE ACT PURSUANT TO 49 U.S.C. § 10505.

18. TRANSACTIONS WHICH OTHERWISE WOULD BE GOVERNED BY SECTION 10901 OF THE INTERSTATE COMMERCE ACT MAY BE EXEMPTED PURSUANT TO THE PROCEDURES SET FORTH IN 49 C.F.R. §§ 1150.31-39, THE EX PARTE 392 EXEMPTION.

19. PURSUANT TO 49 C.F.R. § 1150.32(B), AN EXEMPTION FROM INTERSTATE COMMERCE ACT REQUIREMENTS BECOMES EFFECTIVE SEVEN DAYS AFTER A NOTICE OF EXEMPTION IS FILED WITH THE ICC.

20. LABOR PROTECTIVE PROVISIONS WILL NOT BE IMPOSED BY THE ICC WHERE A TRANSACTION IS EXEMPTED PURSUANT TO THE EX PARTE 392 PROCEDURES; HOWEVER, THE ICC MAY REVOKE TO THE EXTENT IT SPECIFIES SUCH AN EXEMPTION UNDER SECTION 10505(D) OF THE INTERSTATE COMMERCE ACT IF AN EXCEPTIONAL SHOWING OF CIRCUMSTANCES JUSTIFYING THE IMPOSITION OF LABOR PROTECTION IS MADE BY THE AFFECTED LABOR UNION.

21. ON SEPTEMBER 19, 1987, P&LE RAILCO FILED A NOTICE OF EXEMPTION WITH THE ICC PURSUANT TO 49 C.F.R. § 1150.31.

22. RLEA FILED A PETITION FOR A STAY, A PETITION FOR REJECTION OF THE P&LE RAILCO FILING, AND A COMPLAINT SEEKING AN ORDER PREVENTING CONSUMATION OF THE SALE.

23. IN AN OPINION DATED SEPTEMBER 25, 1987, AND SERVED ON SEPTEMBER 29, 1987, THE ICC DENIED RLEA'S REQUEST FOR A STAY, FINDING THAT RLEA HAD NOT OFFERED SUFFICIENT EVIDENCE TO SHOW IT WAS LIKELY TO PREVAIL ON THE MERITS AND THAT IT HAD FAILED TO SHOW IRREPARABLE HARM ABSENT A STAY.

24. THE STRIKE BY THE RLEA SUBSTANTIALLY CURTAILS THE OPERATIONS OF P&LE.

25. P&LE SUFFERS A LOSS OF APPROXIMATELY \$65,250 IN DAILY REVENUES AS A CONSEQUENCE OF THE STRIKE; THESE ARE REVENUES WHICH MAY BE RECOUPED IN PART.

26. SOME OF P&LE'S CUSTOMERS HAVE ACCESS TO NO OTHER RAILROAD BUT P&LE; OTHER CUSTOMERS HAVE ACCESS TO P&LE AND OTHER RAILROADS BUT SUCH OTHER RAILROADS HAVE REFUSED TO SERVICE P&LE CUSTOMERS.

27. THE STRIKE IS INTENDED AND HAS THE EFFECT OF FRUSTRATING AND AVOIDING THE TERMS OF THE SALE AS APPROVED BY THE ICC.

28. THE STRIKE AGAINST P&LE HAS CAUSED AND WILL CONTINUE TO CAUSE SUBSTANTIAL AND IRREPARABLE INJURY TO P&LE UNLESS ENJOINED, IN THAT IT HAS AND WILL CAUSE THE LOSS OF SUBSTANTIAL REVENUES TO P&LE, WHICH MAY NOT BE RECOUPED, AND MAY CAUSE THE PERMANENT LOSS OF CUSTOMERS.

29. THE GRANT OF INJUNCTIVE RELIEF IS IN THE PUBLIC INTEREST IN THAT THE STRIKE HAS AND WILL CAUSE SEVERE ECONOMIC CONSEQUENCES TO P&LE'S CUSTOMERS AND THEIR EMPLOYEES.

30. THE ICC, AND THE STATUTES AND REGULATIONS UNDER WHICH IT OPERATES, BY ITS DECISION OF SEPTEMBER 25, 1987, HAS ELIMINATED THE EFFECTS OF THE SALE UPON P&LE EMPLOYEES AS A LEGITIMATE CONSIDERATION IN THE GRANTING OF INJUNCTIVE RELIEF.

#### CONCLUSIONS OF LAW

1. THIS COURT HAS JURISDICTION OVER THIS ACTION PURSUANT TO THE RAILWAY LABOR ACT, 45 U.S.C. § 151, ET SEQ., AND 28 U.S.C. § 1331.

2. P&LE HAS NO ADEQUATE REMEDY AT LAW.

3. THE DISPUTE BETWEEN THE PARTIES TO THIS ACTION IS A MAJOR DISPUTE, I.E., ONE INVOLVING A MAJOR CHANGE, AFFECTING JOBS, IN AN EXISTING COLLECTIVE BARGAINING AGREEMENT. RAILROAD TELEGRAPHERS V. CHICAGO AND NORTHWESTERN RAILWAY COMPANY, 362 U.S. 330 (1960).

4. P&LE HAS DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS COUNTERCLAIM IN THAT THE STRIKE AT ISSUE IS IN VIOLATION OF THE INTERSTATE COMMERCE ACT, 49 U.S.C. § 10101, ET SEQ.

5. THE STRIKE IS ILLEGAL IN THAT IT SEEKS TO FORCE P&LE TO PROVIDE LABOR PROTECTIVE PROVISIONS IN CONNECTION WITH THE SALE OF ITS ASSETS, THEREBY NEGATING, IN EFFECT, THE ICC'S DETERMINATION THAT SUCH PROVISIONS SHOULD NOT BE REQUIRED IN TRANSACTIONS, SUCH AS THE INSTANT SALE, WHICH HAVE BEEN EXEMPTED FROM INTERSTATE COMMERCE ACT REQUIREMENTS PURSUANT TO 49 U.S.C. § 10505, AND 49 C.F.R. § 1150.31, AND THE ICC'S EX PARTE 392 DECISION.

6. THE ICC'S FAILURE TO STAY THE EXEMPTION RELIEVES P&LE OF THE DUTY TO NEGOTIATE WITH ITS UNIONS CONCERNING THE EFFECT OF THE SALE ON P&LE EMPLOYEES. MISSOURI PACIFIC RAILROAD COMPANY V. UNITED TRANSPORTATION UNION, 782 F.2D 107 (8TH CIR. 1986), CERT. DENIED, 107 S.CT. 3209 (1987).

7. BECAUSE THE INTERSTATE COMMERCE ACT EXEMPTION HAS RELIEVED P&LE OF THE DUTY TO BARGAIN WITH ITS EMPLOYEES, P&LE IS NOT IN VIOLATION OF SECTION 8 OF THE NORRIS-LAGUARDIA ACT, 29 U.S.C. § 108.

8. SECTION 4 OF THE NORRIS-LAGUARDIA ACT, 29 U.S.C. § 104, DOES NOT BAR INJUNCTIVE RELIEF; THE PROVISIONS OF THE NORRIS-LAGUARDIA ACT CANNOT

BE READ ALONE IN MATTERS DEALING WITH RAILWAY DISPUTES, BUT RATHER MUST BE ACCOMMODATED TO THE PURPOSES OF OTHER FEDERAL STATUTES. BROTHERHOOD OF RAILROAD TRAINMEN V. CHICAGO RIVER AND INDIANA RAILROAD COMPANY, 353 U.S. 30 (1957).

9. THE ANTI-INJUNCTION PROVISIONS OF THE NORRIS-LAGUARDIA ACT ARE DISPLACED BY THE JURISDICTION OF THE ICC IN THE INTERSTATE COMMERCE ACT. MISSOURI PACIFIC RAILROAD COMPANY V. UNITED TRANSPORTATION UNION, 782 F.2D 107 (8TH CIR. 1986), CERT. DENIED, 107 S.CT. 3209 (1987).

/S/ Alan M. Bloch

United States District Judge

Date: 10/8/87

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' )  
ASSOCIATION, )

Plaintiff, )

vs. )

PITTSBURGH AND LAKE ERIE )  
RAILROAD COMPANY )

Defendant. )

) Civil Action No. 87-1745

TEMPORARY RESTRAINING ORDER

AND NOW, this 8th day of October, 1987, IT IS  
HEREBY ORDERED that:

1. Plaintiff and each of its members, their lodges, divisions, locals, officers, agents, employees, and representatives, and all persons acting in concert or participating with them, be and hereby are restrained from authorizing, calling, causing, inducing, conducting, permitting, continuing in, or engaging in any picketing, patrolling, self-help or disruptive behavior in any manner interfering with P&LE's operations.

2. Plaintiff and each of its members shall issue such notices and instructions and take all other necessary steps, including intra-union discipline, to carry into effect the intent of this Temporary Restraining Order.

3. The Court retains jurisdiction to issue all other and further relief in law and equity as it deems just and proper.

IT IS FURTHER ORDERED that this Temporary Restraining Order, the same having been issued after notice and a hearing, shall remain in effect until this Court rules on the preliminary injunction sought by defendant.

/S/ Alan M. Bloch  
United States District Judge

cc: Counsel of record.

Entered at 1:35 p.m. this  
8th day of October, 1987, at  
Pittsburgh, Pennsylvania.

Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*

Section 4, 29 U.S.C. § 104

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

- (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
- (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
- (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
- (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
- (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

- (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
- (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
- (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
- (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

**Railway Labor Act, 45 U.S.C. § 151, *et seq.***

**Section 6, 45 U.S.C. § 156**

**§ 156. Procedure in changing rates of pay, rules, and working conditions**

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

May 20, 1926, c. 347 § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197.

Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*

Section 10505, 49 U.S.C. § 10505

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle--

- (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
- (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.
- (b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.
- (c) The Commission may specify the period of time during which an exemption granted under this section is effective.
- (d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.
- (e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to

provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

- (f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continued intermodal movement.
- (g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1361; Pub.L. 96-488, Title II, § 213, Oct. 14, 1980, 94 Stat. 1912.

## Section 10901, 49 U.S.C. § 10901

## § 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may --

- (1) construct an extension to any of its railroad lines;
- (2) construct an additional railroad line;
- (3) acquire or operate an extended or additional railroad line; or
- (4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall--

- (1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;
- (2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

- (3) have a copy of the summary published in the Federal Register;
- (4) take other reasonable and effective steps to publicize the application; and
- (5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

(c)(1) If the Commission--

(A) finds public convenience and necessity, it may --

- (i) approve the application as filed; or
- (ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construction or acquisition (or both) and operation approved by the Commission.

(d)(1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line,

(B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

- (2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1402; Pub.L. 96-448, Title II, § 221, Oct. 14, 1980, 94 Stat. 1928.

**Interstate Commerce Commission Regulations, Part 1150 -  
Certificate to Construct, Acquire, or Operate Railroad Lines,**

**Subpart D -- Exempt Transactions, 49 C.F.R. 1150**

**Subpart D -- Exempt Transactions**

SOURCE: 51 FR 2504, Jan. 17, 1986, unless otherwise noted.

**§ 1150.31 Scope of exemption**

- (a) Except as indicated below, this exemption applies to all acquisitions and operations under section 10901 (*See* 1150.1, *supra*). This exemption also includes:
  - (1) Acquisition by a noncarrier of rail property that would be operated by a third party;
  - (2) Operation by a new carrier of rail property acquired by a third party;
  - (3) A change in operators on the line; and
  - (4) Acquisition of incidental trackage rights. Incidental trackage rights include the grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party that occur at the time of the exempt acquisition or operation. This exemption does not apply when a class I railroad abandons a line and another class I railroad then acquires the line in a proposal that would result in a major market extension as defined at § 1180.3(c).
- (b) Other exemptions that may be relevant to a proposal under this subpart are the exemption for control at § 1180.2(d)(1) and (2), and the from securities regulation at 49 CFR Part 1175.

### § 1150.32 Procedures and relevant dates.

- (a) To qualify for this exemption, applicant must file a verified notice providing details about the transaction, and a brief caption summary, conforming to the format in § 1150.34, for publication in the FEDERAL REGISTER.
- (b) The exemption will be effective 7 days after the notice is filed. The Commission, through the Director of the Office of Proceedings, will publish a notice in the FEDERAL REGISTER within 30 days of the filing. A change in operators would follow the provisions at § 1150.34, and notice must be given to shippers.
- (c) If the notice contains false or misleading information, the exemption is void *ab initio*. A petition to revoke under 49 U.S.C. 10505(d) does not automatically stay the exemption.

### § 1150.33 Information to be contained in notice.

- (a) The full name and address of the applicant;
- (b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;
- (c) A statement that an agreement has been reached or details about when an agreement will be reached;
- (d) The operator of the property;
- (e) A brief summary of the proposed transaction, including:
  - (1) The name and address of the railroad transferring the subject property,

- (2) The proposed time schedule for consummation of the transaction,
- (3) The mile-posts of the subject property, including any branch lines, and
- (4) The total route miles being acquired;
- (f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States; and
- (g) A certificate that applicant has complied with the notice requirements of § 1105.11.

[51 FR 2504, Jan. 17, 1986, as amended at 51 FR 25207, July 11, 1986]

### § 1150.34 Caption summary.

The caption summary must be in the following form. The information symbolized by numbers is identified in the key below:

#### INTERSTATE COMMERCE COMMISSION

*Notice of Exemption*

Finance Docket No.

(1) -- Exemption (2)-(3)

- (1) Has filed a notice of exemption to (2)(3)'s line between (4). Comments must be filed with the Commission and served on (5).(6).

Key to symbols:

- (1) Name of entity acquiring or operating the line, or both.

- (2) The type of transaction, *e.g.*, to acquire, operate, or both.
- (3) The transferor.
- (4) Describe the line.
- (5) Petitioners representative, address, and telephone number.
- (6) Cross reference to other class exemptions being used.

The notice is filed under § 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

## INTERSTATE COMMERCE COMMISSION

## DECISION

Finance Docket No. 31121

P&LE RAILCO INC.--EXEMPTION ACQUISITION AND  
OPERATION--LINES OF THE PITTSBURGH AND LAKE  
ERIE RAILROAD COMPANY AND THE YOUNGSTOWN  
AND SOUTHERN RAILWAY COMPANY

Finance Docket No. 31122

CHICAGO WEST PULLMAN CORPORATION--  
CONTINUANCE IN CONTROL EXEMPTION--P&LE  
RAILCO, INC. AND--CONTROL EXEMPTION--THE  
PITTSBURGH, CHARTIERS AND YOUGHIOGHENY  
RAILWAY COMPANY

Finance Docket No. 31126

RAILWAY LABOR EXECUTIVES' ASSOCIATION

v.

PITTSBURGH &amp; LAKE ERIE RAILROAD CO., ET AL.

Decided: September 25, 1987

On September 19, 1987, P&LE Railco, Inc. (Railco), a noncarrier, filed a notice of exemption under 49 CFR 1150.31 to acquire and operate certain properties of The Pittsburgh and Lake Erie Railroad Company (P&LE) and its wholly-owned subsidiary, The Youngstown and Southern Railway Company (Y&S) (Finance Docket No. 31121). The properties consist of the main line and all branch lines of P&LE and Y&S, which comprise a single system of approximately 182 miles extending generally from

Youngstown, OH, to Brownsville and Connellsville, PA. Also under the agreement, Railco will acquire 230 miles of incidental trackage rights over Conrail lines. Under 49 CFR 1150.32(b), the exemption notice is scheduled to become effective 7 days after it is filed (September 26, 1987).

Railco, which was formed for the purpose of acquiring and operating the lines of P&LE and Y&S, is a wholly-owned subsidiary of noncarrier Chicago West Pullman Transportation Corporation (CWPT), which in turn, is a wholly-owned subsidiary of noncarrier Chicago West Pullman Corporation (CWP). PC&Y Holdings (Holdings) is another noncarrier subsidiary of CWPT. Holdings was formed to acquire the shares of The Pittsburgh, Chartiers and Youghiogeny Railway (PC&Y) that are being purchased from P&LE by Railco.<sup>1</sup>

Concurrently with the filing of Railco's notice, CWP filed a notice of exemption under 49 CFR 1180.2(d)(2) to continue control, through CWPT, of Railco and to control, through CWPT and Holdings, a 50 percent ownership interest in PC&Y (Finance Docket No. 31122).

On September 24, 1987 Howard M. Metzenbaum, United States Senator from Ohio and Richard R. Celeste, Governor of Ohio, filed letter-petitions requesting a stay of the effectiveness of the exemption of this transaction. Also on September 24, 1987, the Commission received a letter from Harry Meshel, Minority Leader of the Ohio Senate, asking the Commission to delay the sale of the P&LE to Chicago West Pullman Corporation. By mailgram received September 24, 1987, U.S. Representative from

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<sup>1</sup> Upon consummation of the purchase by Railco of the assets of P&LE and Y&S, Railco will direct P&LE to deliver to Holdings 50 percent of the stock of PC&Y.

Pennsylvania William J. Coyne asked the Commission to delay its action on the Chicago West Pullman notice of exemption. Ohio State Representative Robert F. Hagan seeks similar relief. Senator Meshel, Representative Coyne, and Representative Hagan wish their correspondence to be treated as stay petitions. We will therefore treat the letters and mailgram as requests for stays.

The Railway Labor Executives' Association (RLEA) filed a complaint,<sup>2</sup> a petition for rejection, and a petition for stay. The complaint (Finance Docket No. 31126) alleges that the provisions of 49 U.S.C. 11343, et seq. rather than 10901, are applicable to the transaction and requests a cease and desist order be issued to prevent consummation. Subsequently, RLEA also filed an emergency petition in Finance Docket No. 31126 for "temporary cease and desist order" in which it addresses issues substantially similar to those raised in its complaint.

The request to reject is based on RLEA's belief that the notice of exemption in Finance Docket No. 31121 is incomplete without an environmental report (see 49 CFR 1105.7). Petitioners also allege that the existence of historical structures on the line requires that various reviews be completed pursuant to the National Historic Preservation Act prior to effectiveness of the exemption. On this basis, it seeks a stay of the exemption.

Railco replied to the requests of Senator Metzenbaum and Congressman Coyne.

The requests for stay will be denied. Petitioners have not demonstrated justification for a stay in accordance with the four criteria set forth in Washington Metropolitan Area Transit

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<sup>2</sup> The RLEA complaint is addressed here only to the extent it requests entry of a cease and desist order.

Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) viz.,

- (1) that there is a strong likelihood that the movant will prevail on the merits;
- (2) that the movant will suffer irreparable harm in the absence of a stay;
- (3) that other interested parties will not be substantially harmed; and
- (4) that the public interest supports the granting of the stay.

In Washington Metropolitan Area Transit Comm., the District of Columbia Circuit held that, in a case in which the other three factors strongly favor interim relief, a stay may be granted if the movant has made a substantial case on the merits. Petitioners have not demonstrated justification for a stay under any of the above criteria. Most importantly, petitioners have not shown that they will likely prevail on the merits or that they will suffer irreparable harm absent a stay.

1. The petitioners have not demonstrated a likelihood that they will prevail on the merits. The size of a transaction, standing alone, is not dispositive of the applicability of the exemption. See, e.g., Finance Docket No. 31071, Red River Valley & Western Railroad Company--Acquisition and Operation Exemption--Certain Lines of Burlington Northern Railroad Company, served July 22, 1987, involving a notice of exemption under 49 C.F.R. 1150.31 for 656 miles of rail line. Nothing in our rules or decision adopting them limits the use of the exemption to transfers of small line segments with little or no public impact. Moreover, while there will be an impact on P&LE and Y&S employees, we have found that the issue of labor protection may be resolved after an

exemption becomes effective. The class exemption rules provide for employee protection upon a showing of particular need. Such showing has not been made so as to justify a stay here.

The issue of review under section 11343 (as opposed to 10901) can also be addressed following effectiveness of the notice (see Finance Docket No. 30237, Maryland Midland Railway, Inc. - Exemption from 49 U.S.C. 11343 and 11301 (not printed), served January 6, 1987 and August 10, 1987, where we reversed a prior decision finding section 10901 applicable). Furthermore, RLEA has not offered sufficient evidence to show it is likely to prevail on the merits of this issue so as to warrant a stay or cease and desist order. Many factors not addressed by RLEA affect whether a transaction such as this will be considered subject to sections 11343 or 10901. See Finance Docket No. 30911, Chicago, Missouri & Western Railway Co. - Exemption Acquisition and Operation - Illinois Central Gulf Railroad Co. (not printed), served May 12, 1987, in which we found that a sale to a newly formed carrier controlled by a company that controlled another rail carrier was subject to section 10901. See also Railway Labor Executives' Association v. I.C.C. and U.S., 819 F.2d 1173 (D.C. Cir. 1987) in which a similar structuring and sale under section 10901 rather than 11343 was affirmed. If, in fact, P&LE's interest in the Monongahela Railway Co. is being transferred, the section 11343/10901 labor issues still can be addressed after the fact. Moreover, the fact that this 1/3 interest may be transferred is not required to be included either in the notice under Ex Parte No. 392 (Sub-No. 1), or the control exemption notice (F.D. No. 31122). Our rules do not specifically require this detailed information, and a 1/3 interest may not, in the circumstances, constitute control.

2. Petitioners have failed to show irreparable harm absent a stay. Under section 10505(d), a petition to revoke can be filed at

any time, even after consummation. Indeed in Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 310 (1986) (Class Exemption). We expressly provided that:

[A]ny transaction could be reversed in whole or in part, and we ~~specifically~~ reserve the right to require divestiture to avoid abuses of market power resulting from the transaction, or to regulate in accordance with the provisions of the rail transportation policy.

Petitioners have failed to show that employees could not be made whole in the unlikely event that the Commission imposes labor protection in a future exemption revocation proceeding. See discussion supra. Consequently, any alleged harm to the affected area based on an adverse impact on employees is speculative.<sup>3</sup> While revocation is normally an adequate remedy, here because this transaction involves the sale of P&LE's entire line, we will require P&LE as a condition to effecting this transaction, to maintain its corporate existence until the Commission has had an opportunity to consider a petition for revocation filed within 30 days. While it is alleged that the transfer may threaten essential services, petitions have failed to offer any other specific evidence of irreparable harm in this regard.

Finally, the environmental and historic structures issues do not support a finding of irreparable harm. In the context of this

<sup>3</sup> RLEA also alleges that stay is justified based on the pendency of AB-160 (Sub-No. 5X), Montour Railroad Company--Abandonment Exemption--In Allegheny and Washington Counties, PA. We disagree. An abandonment was granted there, and the only pending issue is whether labor protective conditions should be imposed. After the fact relief (if found justified) will fully protect railroad employees. This was not a matter relevant to this sale transaction that warranted notice in P&LE's filing.

transaction (i.e., a change in ownership) the quality of the environment could be affected only by a decline in the labor force such that, for example, maintenance-of-way practices would be virtually eliminated. Such a circumstance is not contemplated here.<sup>4</sup> As to historic structures and the section 106 process, the Commission will consult with the appropriate officials in the affected states to ensure compliance and a condition will be imposed to ensure the historic integrity of sites and structures 50 years old or older. A stay is therefore not necessary.

3. Other affected parties would be substantially harmed by the grant of a stay. A stay would likely harm applicant and the shippers it intends to serve. It would delay the start of applicant's operations, and would disrupt the planned transition between P&LE's and Railco's service. P&LE operations are marginal at best. It has lost \$60 million in the past few years. It is unclear whether or how long it can continue operations. It states that for some time it has been in default on \$135 million in debt and, pursuant to a restructuring agreement, has been liquidating assets. Its creditors are increasingly unwilling to continue this procedure. If it is forced shortly to cease operations, the adverse economic impact on shippers, employees, and communities on the lines will be substantial. In addition, the proposed sale of the P&LE to Railco has triggered substantial labor unrest including a strike on the line. A grant of the requested stay would prolong the uncertainty surrounding the fate of the P&LE and also prolong the

<sup>4</sup> The petition to reject will be denied. Our rules are not entirely clear. Applicants could have read 49 CFR 1105.6(c)(2) as applicable. In any event, 49 CFR 1105.7(f) allows waiver of rules on our own motion. We find the notice adequate and see no nexus between the changes contemplated here and adverse impact on the environment.

controversy and attendant disruption in rail service surrounding the sale.

4. The public interest does not support a grant of a stay. Rather, it is in the public interest to allow the class exemption to take effect, and to address the issues raised by petitioners via the revocation process.

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petitions for stay, entry of a cease and desist order, and rejection are denied.

2. Applicants are prohibited from taking any action to jeopardize the historic integrity of sites and structures on the line that are 50 years old or older. This condition will remain in effect pending completion of the section 106 review process.

3. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice Chairman Lamboley dissented. His separate expression will be served separately. Commissioner Simmons dissented with a separate expression.

Noreta R. McGee  
Secretary

(SEAL)

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COMMISSIONER SIMMONS, dissenting:

In fairness I would have granted a stay request of two weeks in order to permit the affected persons, namely employees, to continue negotiations with the seller and vendor. Apparently, Railco is willing to discuss compensation terms for displaced employees and benefits and wages with the unions. I do note here this unique opportunity where a purchaser is willing to provide some type of guarantees to affected employees.

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31121

P&LE RAILCO INC.--EXEMPTION ACQUISITION AND  
OPERATION--LINES OF THE PITTSBURGH AND LAKE  
ERIE RAILROAD COMPANY AND THE YOUNGSTOWN  
AND SOUTHERN RAILWAY COMPANY

Finance Docket No. 31122

CHICAGO WEST PULLMAN CORPORATION--CON-  
TINUANCE IN CONTROL EXEMPTION--P&LE  
RAILCO, INC. AND--CONTROL EXEMPTION--THE  
PITTSBURGH, CHARTIERS AND YOUGHIOGHENY  
RAILWAY COMPANY

Decided: October 13, 1987

On October 2, 1987, the Railway Labor Executives' Association (RLEA) filed a petition for reconsideration of a decision served September 29, 1987, denying the requests for stay of the effectiveness of the exemptions in this proceeding. RLEA asks that a stay be imposed at this time.

The petition will be rejected. Under the Commission's class exemption procedures for the acquisition and operation of rail lines under 49 U.S.C. 10901, a petition for reconsideration of a stay denial does not lie. Title 49 CFR 1150.32(b) provides that an exemption under Subpart D will be effective 7 days after the notice is filed. Moreover, we have already issued a decision declining to stay this transaction. The appropriate remedy at this

stage of the proceeding is a petition for revocation of the exemptions.<sup>1</sup>

RLEA's petition has raised certain matters which do require clarification. The Commission stated in the body of the September 29th decision that "... we will require P&LE as a condition to effecting this transaction, to maintain its corporate existence until the Commission has had an opportunity to consider a petition for revocation filed within 30 days." As RLEA points out, the Commission failed to include this requirement in the ordering paragraph. That oversight will be rectified in this decision. Also, RLEA questions the scope of the historic preservation condition which the Commission imposed upon applicants pending completion of the review process mandated by section 106 of the National Historic Preservation Act. RLEA interprets the condition as preventing only the destruction of the historic structures and not deterioration through reduced maintenance. The Commission's order prohibits applicant from taking any action to jeopardize the historic integrity of the sites and structures on the line that are 50 years old or older. (Emphasis added.) This language obviously encompasses any decrease in maintenance envisioned by RLEA.

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petition for reconsideration is rejected.

2. The Pittsburgh and Lake Erie Railroad is required, as a condition to effecting this transaction, to maintain its corporate existence until the Commission has had an opportunity to consider petitions for revocation filed on or before October 29, 1987.

3. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Simmons dissented in part with a separate expression. Vice Chairman Lamboley dissent with a separate expression.

Noreta R. McGee  
Secretary

(SEAL)

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<sup>1</sup> RLEA also filed a petition for revocation of the exemptions. A decision addressing the petitions for revocation will be issued separately.

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COMMISSIONER SIMMONS, dissenting in part:

I continue to believe that a stay of limited duration was warranted in this proceeding. See my separate expression to the decision of September 29.

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VICE CHAIRMAN LAMBOLEY, dissenting:

I would grant the petition for reconsideration and impose a stay as discussed in my dissenting separate expression to the decision served September 29, 1987.

(2)  
No. 87-1589

SUPREME COURT, U.S.  
**FILED**  
JUN 6 1988  
JAMES C. SPANGLER, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

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THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*  
v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Respondent.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

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**BRIEF OF RESPONDENT IN RESPONSE  
TO THE PETITION**

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WILLIAM G. MAHONEY  
JOHN O'B. CLARKE, JR.\*  
HIGSAW & MAHONEY, P.C.  
Suite 210  
1050 17th Street, N.W.  
Washington, D.C. 20036  
(202) 296-8500  
*Attorneys for Respondent  
Railway Labor Executives'  
Association*

June 6, 1988

\* Counsel of Record

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

No. 87-1589

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Respondent.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

**BRIEF OF RESPONDENT IN RESPONSE  
TO THE PETITION**

On March 24, 1988, petitioner Pittsburgh & Lake Erie Railroad Company [hereinafter, "P&LE"] filed a petition with this Court asking that a writ of certiorari be issued to the United States Court of Appeals for the Third Circuit to review the decision of that Court in *Railway Labor Executives' Association v. P&LE*, 831 F.2d 1231. Respondent Railway Labor Executives' Association [hereinafter, "RLEA"]<sup>1</sup> respectfully submits that this Court should withhold a decision on this peti-

<sup>1</sup> RLEA is a voluntary association of the chief executive officers of nineteen (19) labor organizations which collectively represent virtually all organized rail employees in this Country. RLEA's member organizations are listed in Appendix C attached hereto.

tion until a final ruling is issued in the pending cases dealing with the underlying issue in this dispute—i.e., the proper relationship of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, to the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Those cases, at present, are: *RLEA v. Guilford Transportation Industries, Inc.*, Sup. Ct. No. 87-1911, and *P&LE v. RLEA*, Sup. Ct. No. 87-1888.<sup>2</sup>

### JURISDICTION

Respondent RLEA agrees with petitioner P&LE that this Court has jurisdiction to consider this petition under 28 U.S.C. § 1254(1). However, RLEA disputes petitioner's inference that the district court had jurisdiction to consider the P&LE's complaint for injunctive relief to enforce the Interstate Commerce Act by issuing a strike injunction. Indeed, whether the district court had jurisdiction to issue such an injunction is the question presented by this petition.

### COUNTERSTATEMENT OF THE CASE

In early July 1987, petitioner P&LE entered into an agreement with P&LE Railco, Inc., a newly formed railroad subsidiary of a corporation affiliated with several small railroads, to sell to Railco its rail facilities and operations, except for approximately 6,000 rail cars and certain real estate. Transcript of September 16, 1987 Hearing [hereinafter, "Tr."] at 15. Under the terms of that agreement, Railco would operate the P&LE, but would do so under new rates of pay, rules and working conditions, and would hire only about one-third of the

<sup>2</sup> On May 31, 1988, the Eighth Circuit issued a decision in *RLEA v. Chicago & Northwestern Transportation Co.*, 8th Cir. No. 87-5071, which reached a result in direct conflict with that of the Third Circuit in Sup. Ct. No. 87-1888. That decision has been reproduced herein as Appendix B at 21a-25a. RLEA will be filing a petition for a writ of certiorari in that case, possibly before June 15, 1988, and will suggest that the *Chicago & Northwestern* case be the test vehicle if the *Guilford* petition is not accepted for review.

P&LE's approximately 750 employees. Appendix B to Petition [hereinafter, "Pet. App."] at B-2, ¶s 5, 7, 8.

Twenty-two days after it entered into its sale agreement with Railco, the P&LE sent a letter to all of its employees' representatives, attaching a copy of a letter which that carrier was sending to its employees informing them that the rumors they had heard were true and that the P&LE had entered into an agreement to sell its railroad operations. Exhibit D to RLEA Appendix in 3rd Cir. No. 87-3664 at A. That letter further notified the unions that: "You will be provided with additional information concerning the [sale] transaction as it develops." *Id.* Rail labor responded to the P&LE's announcement by stating that "such a change in ownership will have a significant impact on the working conditions of the P&LE employees" and that "any consummation of this transaction without negotiations pursuant to the Railway Labor Act will be a violation of that statute." *Id.* at B. Rail labor then proposed an expeditious meeting "to negotiate concerning all aspects of this matter including, but not limited to, the decision to sell the rail lines and other assets of the P&LE and the effects of such a transaction on P&LE's employees . . . ." *Id.* Rail labor also requested "all information available regarding this transaction . . . ." *Id.*

Petitioner subsequently responded on August 17, 1987, proposing to meet in early September. Exhibit D, *supra* at D. That meeting, according to the P&LE would not be to negotiate, but rather, would be "informational" "in the interests of keeping employees informed of plans for the P&LE's future, without prejudice to [its] . . . position that 'Section 6' bargaining under the Railway Labor Act is not necessary or appropriate in this instance." *Id.* According to the P&LE (*Id.*):

The anticipated transaction is controlled by the Interstate Commerce Act and is subject to the authority of the Interstate Commerce Commission. Section

6 bargaining, in the railroad's view, would usurp the ICC's authority over the transaction and management's prerogative to conduct the railroad's business as it sees fit.

Most, but not all, of the unions responded by serving notices on the P&LE under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, proposing agreements to deal with the impact of the sale on the P&LE's employees. *E.g.*, Exhibit D, *supra*, at E. Rail labor proposed that the initial conference on those notices be held on September 8, 1987, but on September 1, the P&LE replied that it could not meet on September 8 as labor had proposed and suggested a date of September 25. Exhibit D at F. Fearful that the sale was imminent, rail labor requested on September 4, a meeting earlier than September 25 (*Id.* at G), and when the P&LE did not reply, rail labor struck the P&LE on September 15, 1987.

Petitioner P&LE, on September 16, 1987, asked the United States District Court for the Western District of Pennsylvania to enjoin that strike, and after an unsuccessful effort to resolve this dispute by negotiations during which the strike was called off for slightly more than two days (*see*, Pet. App. at B-3, ¶ 14), the district court relied upon Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108,<sup>3</sup> to deny the P&LE's request for relief on September 21, 1987. Subsequently, the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] denied RLEA's efforts to stay the exemptions under 49 U.S.C. § 10505 which Railco and its related corporations

<sup>3</sup> Section 8 of the Norris-LaGuardia Act provides as follows:

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

had exercised to be relieved of the prior approval requirements of the Interstate Commerce Act, and on October 5, 1987, petitioner P&LE renewed its request for injunctive relief.

On October 8, 1987, the district court issued an interim injunction<sup>4</sup> which enjoined rail labor from striking the P&LE. Pet. App. at B-9. According to the district court, rail labor's strike was intended to, and had "the effect of frustrating and avoiding the terms of the sale as approved by the ICC." Pet. App. at B-5, ¶ 27. Based upon that finding, the court concluded that the strike was illegal in that it sought to force the P&LE to provide benefits to employees who may be affected by the proposed sale where the ICC has not required such benefits as a condition of its sale exemption. *Id.* at B-7, ¶ 5. Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, did not deprive the court of jurisdiction to enjoin such a strike, the district court concluded, because the "anti-injunction provisions of the Norris-LaGuardia Act are displaced by the jurisdiction of the ICC in the Interstate Commerce Act." *Id.* at B-8, ¶ 9. Moreover, Section 8 of the Norris-LaGuardia Act did not deprive the P&LE of standing to seek an injunction because the "Interstate Commerce Act exemption has relieved P&LE of the duty to bargain with its employees . . . ." *Id.* at B-7, ¶ 7.

Respondent RLEA noted an appeal from that injunctive order and sought summary reversal on jurisdictional grounds. On October 26, 1987, the United States Court of Appeals for the Third Circuit issued its decision reversing the order of the district court because it concluded that the lower court was without jurisdiction to issue a strike injunction to enforce the Interstate Commerce Act. Pet. App. at A-13.

<sup>4</sup> While the district court termed its injunction a Temporary Restraining Order (*see*, Pet. App. at B-10), it was, as the court of appeals concluded, a preliminary injunction because it was not of a limited duration. *See*, Pet. App. at A-2 n.1. Petitioners have not challenged that jurisdictional ruling.

After examining the purposes of the Interstate Commerce Act, the Court noted that:

The ICC's authority to consider the incidental effect of the transaction on labor and its discretionary authority to require provisions that protect employees do not make the Interstate Commerce Act comparable to the Railway Labor Act, which contains a comprehensive scheme of alternative dispute resolution mechanisms.

Pet. App. at A-9. The appellate court then observed that this Court in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960), had declined to accommodate the policies of the Norris-LaGuardia Act to the policies of the Interstate Commerce Act. *Id.* at A-10. That holding and the decision in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963), the appellate court concluded, were applicable to this case because they showed "that the Interstate Commerce Act is not one of those rare statutes to which the Norris-LaGuardia Act must be accommodated." Pet. App. at A-11.

Quoting *Texas & New Orleans* (307 F.2d at 157), which in turn quoted this Court in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 41 (1957), the court concluded that:

Such an accommodation need only be made "where Congress, through such detailed legislation as the Railway Labor Act and Taft Hartley Act . . . , has 'channelled these economic forces [capital and labor] . . . into special processes intended to compromise them' . . . and where these processes would be frustrated without injunctive aid."

The court, again quoting *Texas & New Orleans* (307 F.2d at 158), then observed that the special processes which the courts have enforced with injunctive relief

have all involved extensive negotiations and bargaining between the parties, or agreements which result from such bargaining; never processes which allow management to unilaterally choose a change in working conditions and give the union a small voice of protest if the change is unfair or inequitable.

Pet. App. at A-11. As the Third Circuit stated: "This language is directly applicable here, since, in the absence of any provision requiring 'extensive negotiations and bargaining,' RLEA and the employees it represents would be relegated to 'a small voice of protest' without the possibility of either negotiation or economic self-help." Pet. App. at A-11/A-12 (footnoted omitted).

#### SUMMARY OF ARGUMENTS

While respondent RLEA agrees with petitioner and *amicus* that the issues presented by the cases which are presently before this Court dealing with the relationship among the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, the Railway Labor Act, 45 U.S.C. 151, *et seq.*, and the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, are extremely important to the entire rail industry, respondent submits that this case is not the best vehicle to begin the resolution of these issues. Rather, the issues presented by those cases which deal with whether rail labor must strike to force the carriers to the bargaining table, or whether rail labor can instead appeal to the federal courts to enforce the Railway Labor Act, should be the first class of cases decided. If rail labor's position is sustained in those cases (*see*, Sup. Ct. No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*), then there will be no need to review this case because there will be no need to strike, unless of course the bargaining fails to result in an agreement.

Another reason why there is no need to grant the writ of certiorari in this case at this time is that there is no conflict among the lower courts or with any prior deci-

sion by this Court on the issues presented by this case. All of the lower courts which have addressed the ability of federal courts to enjoin strikes arising from the railroads' refusal to bargain with rail labor over sales exempted from regulation under 49 U.S.C. § 10901 by the Commission acting under 49 U.S.C. § 10505 have concluded that they lack such jurisdiction. See, *Burlington Northern R.R. v. UTU*, 8th Cir. Nos. 87-2581 and 87-2600, decided May 31, 1988. Moreover that conclusion is compelled by this Court's oft-repeated admonition that the Norris-LaGuardia Act is not to be accommodated to a nonlabor statute, such as the Interstate Commerce Act (e.g., *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330, 339 (1960)), and should not even be accommodated to the specific command of a labor statute where a strike injunction would strip labor of its ability to resolve its dispute with management through a dispute resolution process that channels equally the forces of labor and management. Forcing rail labor to rely upon the unreviewable discretion of the ICC to obtain whatever protection the ICC concludes is compelled by the public interest, while giving management the absolute right to establish the terms of the transaction to be exempted from regulation, is not the type of dispute resolution process to which the Norris-LaGuardia Act may be accommodated. E.g., *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), cert. denied, 371 U.S. 952 (1963).

## ARGUMENTS

1. RLEA agrees with petitioner P&LE and *amicus* National Railway Labor Conference [hereinafter, "NLRC"] that the impact of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, on the ability of rail labor to bargain over the effects of ICC regulated transactions on rail employees' working conditions, "is the most-litigated and most important railway labor-management controversy now facing the federal courts." NLRC Brief at 10. However, respondent RLEA disagrees with petitioner's and *amicus*' brief that this case is the best vehicle to resolve this controversy, for, while the issue presented—i.e., whether the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, is to be "accommodated" to the Interstate Commerce Act—is important to the rail industry, that issue is not the most crucial question which needs to be resolved. Moreover, this case does not present an issue which needs to be resolved quickly, for it does not present a conflict among the lower courts or with any decision by this Court.

When the controversy over the relationship between the Interstate Commerce Act and rail labor's bargaining ability is examined critically, it becomes apparent that there are essentially four separate questions presented by this dispute. First, there is the question whether the specific immunity granted by 49 U.S.C. § 11341(a) to carriers participating in ICC approved unification financial transactions applies to transactions exempted from regulation by 49 U.S.C. § 10505 and relieves rail carriers of their Railway Labor Act and collective bargaining obligations. A case which presents this question is *RLEA v. Guilford Transportation Industries, Inc.*, Sup. Ct. No. 87-1911.

Second, there is the question which underlies this entire controversy, and that is whether Congress gave the ICC exclusive jurisdiction over all aspects of rail financial transactions subject to regulation by the Interstate

Commerce Act, including labor relations matters. This question is presented in the *Guilford* case and to varying degrees by virtually every case dealing with the relationship between ICC orders and rail labor's collective bargaining and Railway Labor Act rights, including this case.

Third, there is the question whether federal courts have jurisdiction to enforce the Railway Labor Act or contractual rights of employees in the face of an assertion that such a suit would be a collateral attack on the ICC's order. Again, the *Guilford* case is an example of this question, as well as the second *P&LE* case, *i.e.*, Sup. Ct. No. 87-1888, and those cases arising from rail labor's attempts to enforce the Railway Labor Act and collective bargaining agreements. Contrary to the *P&LE*'s arguments, this case does not present that issue because a strike cannot be viewed as a "collateral attack" on an ICC order; a collateral attack, RLEA respectfully submits, requires some form of judicial or quasi-judicial enforcement of rights supposedly barred by the ICC order.<sup>5</sup>

Finally, there is the question which arises when rail labor is unable to bargain or to enforce its contractual or Railway Labor Act rights and must strike to enforce those rights; that issue is whether the Norris-LaGuardia Act must be "accommodated" to the ICC's jurisdiction over rail financial transactions. This case is an example of this question; but this question is of only academic concern if rail employees can enforce their contractual and Railway Labor Act rights notwithstanding the railroads' assertions that orders of the ICC operate to relieve them of their bargaining and contractual obligations to their employees.

<sup>5</sup> Petitioner relies upon *Venner v. Michigan Central R.R.*, 271 U.S. 127 (1926), to support its collateral attack argument, but *Venner* is inapplicable because it involved a court suit to enforce rights asserted to be in conflict with the ICC's order. Here, it is the railroad which seeks to invoke the Court's jurisdiction to enjoin the strike by relying upon the ICC's order.

As RLEA shows below, the Norris-LaGuardia Act accommodation question, unlike the Interstate Commerce Act-Railway Labor Act relationship questions, has not been decided in conflicting ways by the lower courts. *E.g.*, *Burlington Northern R.R. v. UTU*, 8th Cir. Nos. 87-2581 and 87-2600.<sup>6</sup> Moreover, contrary to petitioner's and *amicus*' assertions, refusing to accommodate the anti-injunction Act to the transportation Act, is entirely consistent with prior decisions by this Court, for this Court has refused to accommodate the anti-injunction Act to nonlabor statutes, such as the Interstate Commerce Act, and has stressed that exceptions to the Norris-LaGuardia Act are rare. *E.g.*, *Burlington Northern R.R. v. BMW*, 481 U.S. —, 95 L. Ed.2d 381, 397 (1987).

When it is remembered that the strike occurred in this case because rail labor had previously been unable to enforce the Railway Labor Act's commands in situations involving ICC orders, the first issue which should be examined, RLEA respectfully submits, is the need for the strike, and not whether such a strike can be enjoined. Consequently, RLEA respectfully suggests that this Court review the validity of the ICC's and the railroad's beliefs that ICC orders supersede rail employees' collective bargaining rights. If there is still a need to resolve the issue presented by this case after the causation issue is resolved, RLEA suggests that this Court either grant the petition for a writ in this case or accept review of the recently decided *Burlington Northern R.R. v. UTU*, *supra*, if, as RLEA suspects will occur, the Burlington Northern or rail labor seeks a writ of certiorari after the railroad has sought rehearing by the full Eighth Circuit.

2. Contrary to the *P&LE*'s and *amicus*' assertions, RLEA respectfully submits, the decision below does not

<sup>6</sup> Respondent has reproduced that recent decision as Appendix A to this brief.

conflict with any prior decisions of this Court. In fact, the decision below is entirely consistent with the decisions of this Court in *Burlington Northern R.R. v. BMWE*, *supra*, and *Order of Railroad Telegraphers v. Chicago & North Western R.R.*, *supra*, 362 U.S. at 339.

It should be beyond dispute in this case<sup>7</sup> that the dispute between rail labor and the P&LE which resulted in the strike—i.e., the planned sale of the railroad and the elimination of approximately two-thirds of the jobs and the drastic change of the employment terms of the remaining jobs—is a “labor dispute” within the meaning of Section 13(c) of the Norris-LaGuardia Act, 29 U.S.C. § 113(c).<sup>8</sup> Consequently, the strictures of the Norris-LaGuardia Act apply to this case and deprive the federal courts of jurisdiction to issue a strike injunction unless this case presents one of those “limited circumstances” in which the anti-injunction provisions of the Act must be “accommodated” to enjoin “violations of the specific mandate of another labor statute.” *Burlington Northern R.R. v. BMWE*, *supra*, 95 L. Ed.2d at 397 (emphasis added).

This case does not present one of those “limited circumstances” for several reasons, not the least of which is that a strike by rail labor does not violate any command

<sup>7</sup> Petitioner asserts that RLEA and its member unions are not acting as labor unions because they are trying to have the P&LE sell its rail operations to rail labor. First, there is no finding by the courts below to that effect, and second, petitioner is not precluded by the judgment in this case from seeking to enjoin a strike because the dispute over which the strike is occurring is not a “labor dispute.” *E.g.*, *Bakery Drivers v. Wagshal*, 333 U.S. 437 (1948).

<sup>8</sup> Section 13(c) of the Norris-LaGuardia Act provides that:

The term “labor dispute” includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

of the Interstate Commerce Act or order of the ICC. Petitioner P&LE and the NRLC have not pointed to any specific statutory command which in their opinion, was violated by the strike in this case. Rather, they assert, this strike is “illegal” because by it rail labor seeks to achieve a result—i.e., an agreement to protect employees from the adverse consequences of the sale—which the ICC has refused to impose when requested to do so by RLEA. Pet. App. at B-7, ¶ 5. According to the NRLC, it is inconceivable that employees should be able by a strike to block rail transactions which the ICC has concluded are in the public’s interest. NRLC Brief at 18.

Petitioner’s disbelief that Congress could have intended to allow rail labor to strike over the impact of ICC orders on employees does not make such a strike a violation of the Interstate Commerce Act. Indeed, “[a]bsent clear congressional intent to the contrary, peaceful boycotts and nonviolent picketing are a form of speech or conduct ordinarily entitled to protection under the first and fourteenth amendments to the Constitution.” *Richmond, Fredericksburg & Potomac R.R. v. BMWE*, 795 F.2d 1161, 1163 (4th Cir. 1986), *cert. denied*, 107 S. Ct. 1971 (1987). Here, Congress has decreed in Section 20 of the Clayton Antitrust Act, 29 U.S.C. § 52, that peaceful strikes “shall [not] . . . be considered or held to be violations of any law of the United States[,]” including, RLEA respectfully submits, the Interstate Commerce Act. *E.g.*, 51 Cong. Rec. 13664 (Aug. 13, 1914) (Remarks of Sen. Ashurst); 51 Cong. Rec. 13919 (Aug. 18, 1914) (Remarks of Sen. Borah); 51 Cong. Rec. 14367 (Aug. 28, 1914) (Remarks of Sen. Walsh). That immunity has not been modified insofar as the Interstate Commerce Act is concerned by any subsequent congressional legislation.

Moreover, in *Order of Railroad Telegraphers*, *supra*, 362 U.S. at 338-41, this Court addressed the question of whether the Railway Labor Act or the Interstate Commerce Act made it unlawful for a labor organization to

ask a railroad to bargain over the effect on employees of actions subject to regulation under the Interstate Commerce Act." This Court stated that: "There is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs." 362 U.S. at 340 (footnote omitted). Indeed, after examining the extensive history of bargaining over such subjects, this Court stated (362 U.S. at 338):

In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large.

In *Telegraphers*, this Court noted that nothing about which the union had sought to bargain "would require the railroad to violate any valid law or the valid order of any public agency" (361 U.S. at 340), but that observation is of no comfort to the P&LE, for there is no law or order of the ICC in this case which holds that provid-

<sup>9</sup> Petitioner and the NRLC both assert that *Telegraphers* did not involve an interpretation of the Interstate Commerce Act because only state action was involved. If state action was all that was involved, then the Railway Labor Act would have clearly preempted the state laws. *E.g.*, *UTU v. Long Island R.R.*, 455 U.S. 678 (1982). But more was involved because Congress had delegated to the states the power to regulate station closings. *See*, Brief for Respondents in Sup. Ct. No. 100, 1959 Term, at 47-55.

ing an equitable arrangement to protect employees who may be affected by this sale would be contrary to the public interest. Rather, the ICC's decision in *Ex Parte No. 392 (Sub-No. 1), Class Exemption For The Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table), merely concluded that the public interest did not require the ICC to impose such conditions in Section 10901 sales exempted from regulation. 1 I.C.C. 2d at 815. Indeed, in the recent ICC decision in ICC Finance Docket No. 31205, *FRVR Corp.—Exemption Acquisition and Operation*, served January 29, 1988 at 3 (footnote omitted), *pet. for review pending*, *RLEA v. ICC*, 8th Cir. No. 88-1280 (reproduced as Appendix B to NRLC Brief), the ICC noted that it would consider a sale case to present "exceptional circumstances" warranting the imposition of employee protective provisions if there were "existing contracts [which] specified that line sales were subject to procedural or substantive protection." NRLC Appendix B at 7a.

Consequently, the decision by this Court in *Order of Railroad Telegraphers* strongly supports respondents' assertions and the Third Circuit's inference that rail labor's efforts to use its economic power to obtain some form of protection for its members did not violate any command of the Interstate Commerce Act or order of the ICC. Pet. App. at A-10.

But even if it were assumed *arguendo* that rail labor's efforts to obtain an equitable arrangement to protect P&LE employees affected by sales or other rail financial transactions, was unlawful under the Interstate Commerce Act, that assumption would still not justify a strike injunction because the Interstate Commerce Act is not a labor statute. Petitioner P&LE and the NRLC seek to overcome this hurdle by arguing that the ICC's authority to consider and to protect employee interests

as part of the public interest makes this aspect of the Act a "labor statute" for purposes of accommodating the strictures of the Norris-LaGuardia Act to the congressional purposes fostered by the Interstate Commerce Act. Such an accommodation, petitioner and *amicus* argue, is compelled by this Court's decision in *United States v. Lowden*, 308 U.S. 225 (1934), where this Court "acknowledged the interplay between ICC approvals of railroad consolidations and effects upon rail labor . . . ." Petition at 18. That argument is without merit, but what is more important here, is not so compelling as to require that this case be reviewed first, if this Court accepts the pleas of the entire rail industry and examines the proper relationship of both the Interstate Commerce Act and ICC orders to the Railway Labor Act.

In *Lowden* this Court held that the ICC had the power to impose conditions designed to protect employee interests upon its order approving a rail financial transaction. 308 U.S. at 235-36. But that holding was not premised upon an assumption that the Interstate Commerce Act was a labor statute or, more importantly, that the transportation statute gave the Commission exclusive jurisdiction over labor disputes arising from ICC approved transactions. Rather, this Court framed the "single question" it was deciding as (308 U.S. at 231):

[W]hether we can say, as matter of law, that the granting or withholding of the protection afforded to the employees by the prescribed conditions can have no influence or effect upon the maintenance of an adequate and efficient transportation system which the statute recognizes as a matter of public concern.

This Court then concluded that (308 U.S. at 234):

One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship im-

posed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.

In other words, this Court held in *Lowden* that the ICC had the power to consider and to protect employee interests when it decided whether, in that case, a consolidation transaction was within the public interest. But, as important here, *Lowden* did not hold that the Interstate Commerce Act withdrew from rail labor the ability to devise its own form of protection through negotiations under the Railway Labor Act.

Petitioner's and *amicus*' reliance on *Lowden* is misplaced for another reason as well. Even if the transportation Act could be viewed as being a labor statute, that would still not justify an accommodation of the policies of the Norris-LaGuardia Act in this case. This Court has emphasized that even where there is a violation of a specific mandate of the Railway Act, federal courts "should hesitate to fix upon the injunction remedy . . . unless that remedy alone can effectively guard the plaintiff's right." *Burlington Northern R.R. v. BMW*, *supra*, 95 L. Ed.2d at 398, quoting *IAM v. Street*, 367 U.S. 740, 773 (1961). Moreover, an accommodation should not be made when "the injunction strips labor of its primary weapon without substituting any reasonable alternative." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 41 (1957).

Here, an injunction would strip rail labor of its primary and, indeed, only weapon without substituting any reasonable alternative, for the ICC has emphatically stated that it will not impose provisions to protect employees unless the impact on rail labor is "unique, disproportionate to the gains achieved for the local transport system, and . . . can be compensated without causing termination of the transaction or substantially undoing

the prospective benefits of the Commission's existing policy for other communities and locales." *FRVR Corp.—Exemption, supra*, NRLC App. B at 7a-8a (footnote omitted). Indeed, the ICC has not found one instance in the more than 150 cases involving an exercise of the exemption granted by *Ex Parte No. 392* where it has concluded that employee protection should be imposed. *Id.* at 3a-8a. That fact was fully appreciated by the Third Circuit in this case when it concluded that the Norris-LaGuardia Act's ban of federal court injunctions should not be accommodated to the policies of the Interstate Commerce Act. Pet. App. at A-11/A-12.

3. Contrary to petitioner P&LE's assertion, the Third Circuit's decision in the strike injunction case does not conflict with decisions by other circuits faced with similar issues.

According to petitioner, the Third Circuit's decision in this case conflicts with the decisions by the Eighth Circuit in *Missouri Pacific R.R. v. UTU*, 788 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987), and by the Fifth Circuit in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). However, an examination of those cases, especially when viewed in light of the Eighth Circuit's recent decision in *Burlington Northern R.R. v. UTU*, 8th Cir. Nos. 87-2581 and 87-2600, decided May 31, 1988, shows that there is no conflict among the circuits.

In *Burlington Northern*, the Eighth Circuit reached a result similar to that reached by the Third Circuit in this case in an identical factual situation—*i.e.*, a strike over a railroad's refusal to bargain concerning the impact on employees of a sale exempted from regulation by *Ex Parte No. 392*. While the Eighth Circuit concluded, erroneously RLEA respectfully submits, that such an exemption relieves a rail carrier of its Railway Labor

Act obligations (*see*, Appendix A at 12a-13a), it also held that the Norris-LaGuardia Act was not to be accommodated to the policies of the Interstate Commerce Act as set forth in Section 10901 of that Act, 49 U.S.C. § 10901. That result differed from the conclusion reached in *Missouri Pacific R.R. v. UTU, supra*, because, according to the Eighth Circuit, the *Missouri Pacific* case involved an application of the immunity granted by 49 U.S.C. § 11341(a) to override the strictures of the Norris-LaGuardia Act, whereas Section 11341(a) was not applicable to the *Burlington Northern* case. *See* Appendix A at 13a-15a. The Third Circuit had rejected the *Missouri Pacific* case's holding for a similar reason. Pet. App. at A-12 n.8.

Petitioner's reliance on *Texas & New Orleans* is similarly misplaced because that case, too, involved the question of whether Section 11341(a)'s predecessor, 49 U.S.C. § 5(11) (1970) (repealed by Pub. L. No. 95-473, 92 Stat. 1337, and recodified as 49 U.S.C. § 11341(a)), operated to restore to the federal courts the jurisdiction which the Norris-LaGuardia Act has withdrawn to enjoin strikes. The Fifth Circuit answered that question by holding that Section 11341(a)'s predecessor did not restore that jurisdiction. While the court then went on to add that if the differences between the unions and the carriers should subsequently "prove irreconcilable, and the question [as to the appropriate employee protection] is suitably presented to the Commission" (307 F.2d at 162), a Commission decision that the union's request for relief was contrary to the public interest "may" give the carriers "ground for" injunctive relief, that statement is clearly not a holding; it is mere *dicta*. More important, that *dicta*, RLEA submits, is contrary to this Court's holding in *Burlington Northern R.R. v. BMW*, *supra*, 95 L. Ed.2d at 391 n.3, that the Norris-LaGuardia Act may not be accommodated to a non-labor statute, such as the Interstate Commerce Act.

Finally, it should be observed that the Third Circuit's decision has been followed by every district court recently called upon by the railroads to enjoin strikes by rail labor growing out of sales of rail lines exempted from regulation by *Ex Parte No. 392*.<sup>10</sup> In short, this case does not present a conflict which needs to be resolved at this time by this Court.

4. While RLEA does not assert that this case is moot, and indeed submits it is not moot because of the uncertainty over the outcome of the current negotiations, the relationship of this petition to the Third Circuit's decision of April 8, 1988, affirming the injunction requiring the P&LE to comply with the Railway Labor Act (*RLEA v. P&LE*, 845 F.2d 420, *pet. for cert. pending*, Sup. Ct. No. 87-1888), militates against a review of this decision until after the April 8th decision is reviewed or that petition is denied. There is no strike of the P&LE at this time, and none is threatened because the need for economic action was removed by the courts' enforcement of the Railway Labor Act. Thus, this case may never be a good vehicle to resolve the Norris-LaGuardia Act accommodation issue.

<sup>10</sup> Besides the cases involved in *Burlington Northern*, *supra*, those cases include: *Chicago & North Western Transportation Co. v. RLEA*, N.D. Ill. No. 88 C 0444, decided March 16, 1988, *appeal pending*, 7th Cir. No. 88-1504; *Atchison, Topeka & Santa Fe Ry. v. RLEA*, N.D. Ill. No. 87 C 9847, decided November 20, 1987 (TRO denied); *City of Galveston v. UTU*, S.D. Tx. No. G-87-386, decided November 18, 1987 (injunction dissolved).

## CONCLUSION

For the reasons set forth above, respondent RLEA respectfully submits that this Court should withhold acting on the P&LE's petition for a writ of certiorari in this case until after this court resolves the petitions in Sup. Ct. Nos. 87-1911 and 87-1888.

Respectfully submitted,

WILLIAM G. MAHONEY  
JOHN O'B. CLARKE, JR.\*  
HIGSAW & MAHONEY, P.C.  
Suite 210  
1050 17th Street, N.W.  
Washington, D.C. 20036  
(202) 296-8500  
*Attorneys for Respondent*  
*Railway Labor Executives'*  
*Association*

June 6, 1988

\* Counsel of Record

## **APPENDICES**

1a

APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No. 87-2581

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BURLINGTON NORTHERN RAILROAD COMPANY,  
*Appellee,*

v.

UNITED TRANSPORTATION UNION,  
*Appellant.*

FRED A. HARDIN, J.W. REYNOLDS,  
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,  
J. F. SYTSMA and W. C. WALPERT.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Appellee,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,  
UNITED TRANSPORTATION UNION,  
*Appellant.*

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No. 87-2600

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Appellant,*

v.

UNITED TRANSPORTATION UNION,  
*Appellee,*

FRED A. HARDIN, J.W. REYNOLDS,  
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,  
J. F. SYTSMA and W. C. WALPERT.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Appellant,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,  
UNITED TRANSPORTATION UNION,  
*Appellee.*

Appeal from the United States District Court  
for the Western District of Missouri

Submitted: December 15, 1987

Filed: May 31, 1988

Before HEANEY, ARNOLD and FAGG, Circuit  
Judges.

HEANEY, Circuit Judge.

### I. Overview

Burlington Northern Railroad Company (BN) announced its intention to sell a section of its rail lines to the Montana Rail Link (MRL), a newly formed corporation. This type of transaction was recently exempted from Interstate Commerce Commission (ICC) approval requirements, which generally involved the imposition of labor protective conditions. *See Ex Parte No. 392 (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1986), review denied sub nom. Illinois Commerce Comm'n. v. ICC, 817 F.2d 145 (D.C. Cir. 1987) (Ex Parte No. 392).* After unsuccessfully attempting both to engage BN in negotiations over the effects of the sale on BN employees and later to enjoin the sale, the United Transportation Union (UTU) threatened to strike. BN sought a preliminary injunction against the strike. The district court denied BN's request, finding the Norris-LaGuardia Act, 29 U.S.C. §§ 110-115 (Norris-LaGuardia) prohibited such relief. It did, however, grant an injunction pending review by our Court. On appeal, BN claims that Norris-LaGuardia must be accommodated to the action of the ICC in *Ex Parte No. 392*, and thus cannot bar an injunction. Alternatively, it argues that the Railway Labor Act, 45 U.S.C. § 151-188 (RLA), prohibits the strike because the UTU has not exhausted major dispute procedures under that Act.

We affirm the decision of the district court insofar as it held that Norris-LaGuardia prevents the issuance of an injunction here, and we dissolve the injunction issued by the district court pending this appeal. Second, we find the RLA's major dispute procedures are, in this instance,

superseded by the terms of the Interstate Commerce Act, 49 U.S.C. § 10101-11917 (ICA), and thus cannot bar the strike.

## II. *Factual Background*

In July, 1987, BN announced its intention to lease approximately 830 miles of its trackage to MRL, a newly formed corporation. These rail lines extend from Huntley, Montana, to Sand Point, Idaho. BN also proposed to sell various branch lines, equipment, personal property, and facilities to MRL. In the past, this transaction would have been contingent upon the approval of the ICC, and labor protective conditions would normally have been imposed for the protection of BN employees. However, recently, such sales have been exempted from ICC approval procedures. See *Ex Parte No. 392*, 1 I.C.C.2d 810 (1986).

In compliance with *Ex Parte No. 392*, MRL filed a petition for exemption. Under the terms of *Ex Parte No. 392*, such exemptions are automatically granted seven days after they are filed. See 49 C.F.R. § 1150.32(b). Several parties requested a stay of the exemption. The ICC, however, denied those requests and the exemption issued on July 31, 1987. Finance Docket No. 31087, decided July 31, 1987, *Montana Rail Link, Inc.—Exemption Acquisition and Operation—Certain Lines of the Burlington Northern Rail Company*. Subsequently, a number of the unions representing BN employees, including the UTU, filed petitions to revoke the exemption. These petitions requested labor protection for BN employees affected by BN's action. The ICC has not yet ruled on these petitions. The transaction was closed on October 31, 1987, after the ICC made a specific finding that it was "in the public interest" and after the unions unsuccessfully sought an injunction against the transaction in the United States District Court for the District of Montana. *United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579 (D. Mont. 1987).

Before the Montana district court, the unions sought to enjoin the sale and maintain the status quo until the arbitration and mediation provisions of the RLA were exhausted. The district court refused to grant this request. Relying on *Railway Labor Executives' Ass'n v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, — U.S. —, 107 S.Ct. 927 (1987), it found that the mandatory bargaining procedures of the RLA would frustrate the action of the ICC and thus did not provide the court with authority to issue an injunction. 672 F. Supp. at 1582. However, the court, citing *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3rd Cir. 1987), did note that there was no inherent incompatibility between the ICC's action and the provisions of Norris-LaGuardia, thus suggesting that Norris-LaGuardia would bar an effort to enjoin a subsequent strike by the unions. 672 F. Supp. at 1582-83 n.3. The UTU has appealed this decision to the Ninth Circuit.

After the Montana district court denied the unions' motion to enjoin the sale, the UTU threatened a nationwide strike against BN. BN immediately sought a temporary restraining order and a preliminary injunction from Judge Joseph E. Stevens of the United States District Court for the Western District of Missouri. See *Burlington Northern R.R. v. United Transp. Union*, No. 86-5013-CV-SW-8, slip op. (W.D. Mo. Nov. 16, 1987). The court granted the temporary restraining order but subsequently denied the request for a preliminary injunction. In declining to issue a preliminary injunction, Judge Stevens placed primary reliance on *Pittsburgh and Lake Erie*, 831 F.2d 1231. A few hours later, the court granted BN's motion for an injunction pending appeal. We denied UTU's motion to suspend the injunction pending appeal and directed BN to avoid further layoffs until we had decided the matter.

On appeal, BN contends that the ICA vests the ICC with exclusive and plenary jurisdiction to resolve disputed issues. Thus, they argue, Norris-LaGuardia does not bar an injunction against the proposed strike. Second, BN maintains the RLA prohibits the strike since UTU has not exhausted major dispute procedures.

### III. *The ICA, the RLA and Norris-LaGuardia*

#### A. Statutory Framework

##### 1. The Interstate Commerce Act (ICA)

The ICA is fundamentally a statute designed to regulate commerce. Its goal is to make commerce flow smoothly to the benefit of both American industry and consumers. The Act seeks to ensure fair shipping rates, safety and efficiency in transportation, and to preserve the viability of various modes of transportation. The ICA also seeks to discourage harmful monopolistic practices, detrimental state regulation, and labor strife—all of which tend to impede commerce to the detriment of industry and consumers. *See* 49 U.S.C. §§ 10101, 10101a.

The ICA generally requires that before a railroad acquires an additional line or abandons a line, the rail carriers involved in the transaction must obtain the approval of the ICC, 49 U.S.C. §§ 10901, 10903. Pursuant to the ICA's goal of preventing labor strife by "encourag[ing] fair wages and safe and suitable working conditions in the railroad industry," *see* 49 U.S.C. § 10101a(12), approval by the ICC has in the past generally required the imposition of plans to compensate workers displaced by the particular transaction. These plans are called labor protective conditions or labor protective agreements. Under its authority, the ICC has developed standard labor protective conditions for particular types of transactions.<sup>1</sup>

<sup>1</sup> When the transaction involves the sale of a rail line, the ICC imposes its *New York Dock* conditions upon the parties. *See New*

In the early 1970's the railroad industry, for a variety of reasons, began to experience economic difficulty. In 1976, concern about the "financial health" of this industry prompted Congress to pass the Railroad Revitalization and Regulatory Reform (4-R) Act, Pub. L. No. 94-210, 90 Stat. 31 (1976). The 4-R Act empowered the ICC, *inter alia*, to exempt individual transactions or classes of transactions from the Act's prior approval requirements (and thus avoid the cost of labor protective conditions). Pub. L. No. 94-210, 90 Stat. at 42.

Four years later, in another deregulatory effort, Congress passed the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). In the Staggers Act, Congress attempted to "reduce regulatory barriers to entry into and exit from the [railroad] industry." *Id.* § 101(a), 94 Stat. 1897, codified at 49 U.S.C. § 10101a. Specifically, the Act broadened the exemption provisions codified at 49 U.S.C. § 10505, to provide that exemptions "shall" be granted to carry out the Staggers Act national rail policy. 94 Stat. at 1913.

In 1986, the ICC, in an *ex parte* rule-making procedure, exercised its new section 10505 power to exempt, as a class, line sales to "new carriers"<sup>2</sup> from the detailed approval procedures required under section 10901. *See Ex Parte No. 392*, 1 I.C.C.2d 810 (1986). To facilitate these sales, the ICC further prescribed an expedited approval procedure in place of the procedure that would otherwise apply under section 10901(b). Under the class exemption, sales to new carriers are authorized to go forward seven days after the parties file verified notices with the ICC. *Id.* at 820, *see also* 49 C.F.R. § 1150.32(b).

*York Dock Ry.—Control—Brooklyn E.D. Terminal*, 360 I.C.C. 60 (1979), *aff'd*, 609 F.2d 83 (2d Cir. 1979). If it is a case of abandonment, it imposes *Oregon Short Line III* conditions. *See Oregon Short Line R.R.—Abandonment*, 360 I.C.C. 91 (1979).

<sup>2</sup> "New carrier" means a newly formed railroad not already subject to the ICA.

The ICC's action in *Ex Parte No. 392* was appealed to the United States Court of Appeals for the District of Columbia Circuit. That court denied review of the ICC's action without an opinion. *Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

## 2. The Railway Labor Act (RLA)

The RLA regulates the relationship between railroads and their employees. The purposes of the Act include avoiding interruption to commerce, ensuring worker freedom of association and the right to unionize, providing for the "prompt and orderly" settlement of employment related disputes, and securing the "complete independence" of railroads and their employees in matters of self-organization and in carrying out the Act's other purposes. See 45 U.S.C. § 151a.

Under the RLA, controversies over proposed changes in collective bargaining agreements are termed "major" disputes (to be distinguished from "minor" disputes over the "interpretation or application" of existing agreements and practices). *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723-24 (1945). Under §§ 2 Seventh and 6 of the Act, a party desiring to change a working condition embodied in an existing agreement, or to bring a condition not previously covered within an agreement, must serve a "§ 6 notice" upon the opposing party. 45 U.S.C. §§ 152 Seventh, 156. The resulting major dispute is subject to dispute resolution including conference, mediation, and, in some cases, proceedings before a presidential emergency board. 45 U.S.C. §§ 155, 156, 160. Until these procedures are exhausted, neither party may change the status quo, i.e., the "actual objective working conditions" in existence at the beginning of the dispute. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149, 153 (1969).<sup>3</sup>

<sup>3</sup> The Act lacks any mechanism to compel agreement in major disputes. Binding arbitration of a major dispute is available only

## 3. The Norris-LaGuardia Act

The Norris-LaGuardia Act withdraws jurisdiction from the federal courts in cases growing out of labor disputes. The Act clearly states:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as the terms are herein defined) from \* \* \*

(a) Ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104.

The public policy behind Norris-LaGuardia is clearly stated in the Act. Specifically, the Congress found that prevailing socio-political and economic conditions prevented individual workers from obtaining "acceptable terms and conditions of employment." Therefore, Norris-LaGuardia sought to ensure workers the right to organize and conduct union activities "free from the interference, restraint, or coercion" of employers or their agents by means of labor injunctions. See 29 U.S.C. § 102.

if both parties agree to it. See 45 U.S.C. §§ 155, 157; *Elgin J. & E. Ry.*, 325 U.S. at 725.

Section 3 of the RLA commits minor disputes over the "interpretation or application" of existing agreements and practices to the exclusive jurisdiction of Adjustment Boards, i.e. to "compulsory arbitration." *Brotherhood of R.R. Trainmen v. Chicago R. & I. R. R.*, 353 U.S. 30, 39 (1957); 45 U.S.C. § 153 First (i); see *Elgin J. & E. Ry.*, 325 U.S. at 724. If the resolution of a labor dispute arguably depends upon the interpretation or application of a collective bargaining agreement or established past practice, the dispute must go to an Adjustment Board, not to a court. *Brotherhood of Maintenance of Way Employees v. Burlington Northern Ry.*, 802 F.2d 1016, 1022 (8th Cir. 1986). While the controversy is pending before the Board, the carrier is free to apply its interpretation of the disputed agreement or past practices. *Id.*

## B. Analysis

As noted above, the ICA is fundamentally a commerce statute directed toward ensuring the free flow of commerce. The RLA is a labor statute that orders the relationship between railroads and their employees. Norris-LaGuardia is a jurisdictional labor statute designed to deal with historical anti-union animus in the federal courts by withdrawing jurisdiction in cases growing out of labor disputes. Each of these congressional enactments are intended to be preeminent in terms of the subject matter they regulate. However, toward the periphery of the authority granted under each law, there exist overlapping powers and responsibilities which must be accommodated and harmonized.

For example, when the imperatives of labor statutes such as the RLA and Norris-LaGuardia conflict, the federal courts have determined that if the provisions of the RLA represent some "overriding, equally clear yet irreconcilable labor policy" which would be frustrated by the literal enforcement of Norris-LaGuardia's anti-injunction provisions, the latter act can be accommodated. *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231, (citing *Chicago & North Western Ry. v. United Transp. Union*, 402 U.S. 570 (1971); *Boys Market, Inc. v. Retail Clerk's Union Local 770*, 398 U.S. 235 (1970); *Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R.*, 373 U.S. 33 (1963); *Brotherhood of R.R. Trainmen v. Chicago & Indiana R.R.*, 353 U.S. 30 (1957); *Brotherhood of Ry. Trainmen v. Howard*, 343 U.S. 768 (1952)).

Yet, the problem of harmonizing labor statutes with statutes in other fields—particularly those which encourage commerce and industrial expansion—presents far more difficult balancing problems. In this age of trade unions with nationwide membership, it is increasingly difficult to remember that without the clear protections erected by the Congress in Norris-LaGuardia, the RLA,

and the National Labor Relations Act, 29 U.S.C. §§ 151-187, the right to organize, the right to bargain collectively, and the right to strike in the United States were simply untenable propositions.

The preamble to Norris-LaGuardia recognized this problem in stark terms. The statute withdrew jurisdiction from the federal courts to enjoin labor disputes in the realization that:

under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment* \* \* \*.

29 U.S.C. § 102 (emphasis added).

Moreover, the Supreme Court has recently recognized the fundamental importance of Norris-LaGuardia in terms of the viability of the labor movement:

The Norris-LaGuardia Act . . . express a basic policy against the injunction of activities of labor unions.

\* \* \*

The congressional debates over the Norris-LaGuardia Act disclose that the Act's sponsors were convinced that the extraordinary step of divesting federal courts of equitable jurisdiction was necessary to remedy an extraordinary problem.

\* \* \*

The Norris-LaGuardia Act responded directly to the \* \* \* pattern of injunctions entered by federal judges. "The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Con-

gress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction."

*Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. —, 107 S.Ct. 1841, 1846-47 (1987) (citations omitted).

Finally, experience shows that as the protections of labor statutes are diluted, even under the "neutral" terms of deregulatory actions by Congress, the economic power of employees is visibly diminished by both contracting the authority of their representatives to bargain on their behalf and by reducing the ranks of their organized membership.

With this in mind, we turn to the task of exploring the interplay between the ICA, the RLA, and Norris-LaGuardia.

Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring "fair wages and working conditions in the railroad industry." 49 U.S.C. § 10101a(12). To accomplish this important but limited aim, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines. But it did so only insofar as this authority is necessary to "assure fair wages and working conditions" in order to ensure the free flow of commerce. In these narrow circumstances, the ICA supersedes the authority of the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements. Were it otherwise, the ICC's authority in this area, and specifically its recent deregulatory actions, would be largely nullified. However, the ICA does not so easily supersede Norris-LaGuardia for, except where Congress has specifically exempted the ICA from the operation of other laws and required mandatory labor

protective conditions, nowhere in the ICA is there any indication of its direct incompatibility with the anti-injunction statute. Clearly, Norris-LaGuardia says nothing about the methods by which labor protective agreements are made, but rather represents a completely independent and very clear decision by Congress to insulate labor disputes from the injunctive powers of the federal courts.

Our decision in *Missouri Pacific Ry. v. United Transp. Union*, 782 F.2d 107 (8th Cir. 1986) (per curiam), cert. denied, — U.S. —, 107 S.Ct. 3209 (1987), when read in conjunction with *Railway Labor Executives' Ass'n v. Staten Island R.R.*, 792 F.2d 7 and *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 illustrates implicitly the interaction of these three federal statutes.

In *Missouri Pacific*, we held that when a consolidation transaction subject to 49 U.S.C. §§ 11341, 11347, statutory provisions which specifically exempt carriers from all other law<sup>5</sup> and require mandatory employee protective conditions<sup>6</sup>, neither the RLA nor Norris-LaGuardia

<sup>5</sup> 49 U.S.C. § 11341(a) provides:

The authority of the Interstate Commerce Commission under this subchapter is exclusive. \* \* \* A carrier, corporation, or person participating in [an] approved or exempted transaction is exempt from all other law, including State and municipal law, as necessary to let that person carry out the transaction.

\* \* \*

"[T]his subchapter" refers to Subchapter III of Chapter 113 of the ICA, §§ 11341-51, under which the transaction in *Missouri Pacific* was approved, and not 49 U.S.C. § 10901, Subchapter I of Chapter 109 of the Act, applicable here.

<sup>6</sup> 49 U.S.C. § 11347 provides:

When a carrier is involved in a transaction for which approval is sought under [the consolidation provisions] of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement \* \* \* protective of the interest of employees who are affected by the transaction \* \* \*.

could operate to restrict the terms of the ICA. In the *Staten Island* case, the Second Circuit found, in a transaction governed by 49 U.S.C. § 10905 (similar to the transaction here in controversy), there was jurisdiction under the RLA in terms of the bargaining relationship between the railroad and the unions. However, the court found that the ICA's action approving the transaction withdrew from the courts the power under the RLA to "formulate a meaningful remedy without impinging on the ICC's order approving the sale in question."<sup>7</sup> 792 F.2d at 12, *see also United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579, 1582-83. They thus dismissed the case under Fed. R. Civ. P. 12(b) (6).<sup>8</sup>

Finally, in the *Pittsburgh & Lake Erie* case, the Third Circuit, with a transaction identical to the one before us, faced a request by an employer railroad to accommodate Norris-LaGuardia to the ICA. The court refused to do so, recognizing both the overriding importance of Norris-LaGuardia and finding no irreconcilability between the ICC's authority over the bargaining process and Norris-LaGuardia's prohibition against injunctions. Specifically, the court stated:

[None of the provisions] relied on by P & LE which makes the ICC's authority "exclusive" with respect to combinations of carriers, contains any language which would suggest Congress intended to override the anti-injunction policy of section 4 of the Norris-LaGuardia Act by the Interstate Commerce Act.  
\* \* \* Neither the ICC nor P & LE have pointed to any language in the legislative history of any of the

<sup>7</sup> In *Staten Island*, the viability of Norris-LaGuardia in terms of the ICA was not at issue.

<sup>8</sup> In *Railway Labor Executives' Ass'n. v. Pittsburgh & Lake Erie R.R.*, No. 87-3797, slip op. (3rd Cir. April 8, 1988), the Third Circuit in a carefully crafted opinion by Judge Becker, recently found that the ICC's action in Ex Parte No. 392 did not preempt the RLA.

labor laws or the Interstate Commerce Act which suggests that the strong national policy embodied in the Norris-LaGuardia Act is to be subordinated to the ICC's authority to approve an acquisition of railroad property.

831 F.2d at 1235-36.

Thus, the interplay of these three statutes can be summed up as follows. When the ICA provides a specific exemption from all other law and mandates inescapable employee protective conditions under provisions such as 49 U.S.C. §§ 11341(a), 11347, it effectively supersedes both the RLA and Norris-LaGuardia. If there is no exemption and specific protection is not mandated, the authority of the ICA only extends to the bargaining process concerning wages and working conditions. In these circumstances, while the bargaining provisions of the RLA are superseded, Norris-LaGuardia is unaffected and remains to protect the employees' interests.<sup>9</sup>

<sup>9</sup> In *United Transp. Union v. Burlington Northern R.R.*, 672 F. Supp. 1579, the United States District Court for the District of Montana came to exactly this conclusion. This court, like ours, relying on *Staten Island*, found that mandatory bargaining provisions of the RLA were superseded by the terms of the ICA. However, the court, citing *Pittsburgh & Lake Erie*, found that the ICC's action did not affect the viability of Norris-LaGuardia. Specifically, the court stated:

Both parties have brought to the attention of the court an opinion handed down by the Third Circuit on October 26, 1987, where the court reversed a district court decision enjoining a labor strike. The Third Circuit found that Section 4 of Norris-LaGuardia need not be accommodated to the Interstate Commerce Act. *Railway Labor Executives' Association v. Pittsburgh & Lake Erie R.R. Co.*, 831 F.2d 1231 (3d Cir. 1987).

The case involved facts very similar to those in the instant case. The Railroad was selling its rail lines to a new non-carrier entity which filed for, and received, an exemption pursuant to section 10505 of the ICA. The union filed section 6 notices pursuant to the RLA and the railroad refused to negotiate. However, there the union chose to strike. Section 4 of

Moreover, this notion of the viability of Norris-LaGuardia in the face of the supersedure of the RLA is clearly in line with what Congress intended. In examining the impetus behind the recent deregulatory efforts in the railroad industry, Congress has sought to free the union-management relationship from time-consuming, "process oriented" bureaucracy imposed by various regulatory statutes and to allow the sagacious invisible hand of the free market economy to reorder rapidly that industry's economic difficulties. Thus, while we agree with BN's contention that enforcing the mandatory bargaining provisions of the RLA might render the changes in the ICA without much practical force, we find, like the Third Circuit, no inherent incompatibility between these actions and Norris-LaGuardia. Clearly implicit in the congressional vision of a vigorous free market is the realization that all major participants in the economy must be left free to exercise their economic strength and thus return the economy to its natural order. We thus find it impossible to believe that Congress would leave the railroads free to exercise their economic power to advance their goals, yet forbid the unions to use their strength to protect the interests of their membership.

In the end, should Congress wish to accomodate Norris-LaGuardia to the ICC in this situation, it can do so explicitly. Such a decision concerning such a significant

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the Norris-LaGuardia Act forbids federal district court injunctions against labor strikes. 29 U.S.C. § 104.

*A strike by union members against their employer does not directly contradict or encroach upon the authority of the ICC. The authorization of the sale still stands, and at the same time the employees have the right to pressure the employer to negotiate labor protections. The case is distinguishable in that an injunction of the sale would itself directly contradict and infringe upon the authority of the ICC. Congress has given full authority over sales and acquisitions of railroads to the ICC pursuant to the ICA.*

672 F. Supp. at 1582-82 [sic] n.3 (emphasis added).

change in federal labor policy is too important to be found implicitly by a court in the interstices of a federal statutory scheme.

#### IV. Conclusion

In its decision in *Ex Parte No. 392*, the ICC has acted within its authority by exempting, as a class, sales to new carriers from the requirement of imposing labor protective conditions. Moreover, the ICC's authority to supervise and implement labor protective conditions in terms of sales, acquisitions, and abandonments by railway carriers insofar as this authority is necessary to "assure fair wages and working conditions" supersedes the authority of the mandatory bargaining provisions of the RLA. We thus dismiss BN's claim under the RLA.<sup>10</sup> However, we find no inherent incompatibility between the recent deregulatory efforts of the Congress and the ICC and the continued viability of Norris-LaGuardia in the circumstances presented here. We thus affirm the decision of the district court declining to issue an injunction against the proposed strike by the UTU and dissolve the temporary injunction put in place pending this appeal.

FAGG, Circuit Judge, dissenting.

The district court denied BN's motion for a preliminary injunction against UTU's threatened strike, disclaiming jurisdiction to enjoin the strike on account of

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<sup>10</sup> We would alternatively dismiss BN's claim under the RLA on the merits. BN maintains that a strike by the UTU should be enjoined because the UTU did not invoke the major dispute resolution procedures of the RLA and thus must exhaust their remedies before they can strike. The UTU did, however, attempt to do so by serving a Section 6 notice, but was frustrated in this effort by an arbitration award holding that, under the applicable collective bargaining agreements, the Union had no right to serve such a notice before April 1, 1988. We believe the operative fact here is that BN itself changed the status quo without serving a Section 6 notice and would thus be barred from seeking injunctive relief by its own omission.

the Norris-LaGuardia Act (NLGA). See 29 U.S.C. § 104. I do not share the district court's view that injunctive relief is unavailable to protect an ICA order from disruption by a union strike that in essence challenges the terms of that order.

The court correctly observes that when the NLGA and the ICA overlap, they "must be accommodated and harmonized." *Ante* at 10. This accommodation is necessary because neither statute "may meaningfully be read in isolation \* \* \* for they are in fact, an integrated plan of railroad regulation. And if, as is frequently the case in such undertakings, there be overlappings, '[w]e must determine \* \* \* how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.'" *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 352 (1960) (quoting *Ailen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 806 (1945)) (Whittaker, J., dissenting).

There is no dispute the ICC has discretionary authority to impose labor protective conditions in this type of transaction. See 49 U.S.C. § 10901(c)(1)(A)(ii); *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231, 1235 (3d Cir. 1987); *Winter v. ICC*, 828 F.2d 1320, 1323 (8th Cir. 1987). It is also clear the ICC has the power to grant or deny UTU's pending request for those conditions, *ante* at 4, and UTU will have access to judicial review of an adverse decision, see 28 U.S.C. § 2321(a). Simply stated, Congress has charged the ICC with the responsibility to impose protective labor conditions that are "necessary in the public interest" in section 10901 transactions. 49 U.S.C. § 10901(c)(1)(A)(ii).

The court holds, however, that when labor protective conditions are discretionary rather than mandatory, the ICA cannot displace the NLGA's antiinjunction provisions because that situation presents no "direct incom-

patibility" between the NLGA and the ICA. *Ante* at 13. I believe the court and the Third Circuit have drawn an illusory distinction between mandatory and discretionary conditions. See *Railway Labor Executives' Ass'n*, 831 F.2d at 1334-37. This approach to the issue has led the court mistakenly to conclude the district court was correct in deciding it was without jurisdiction to enjoin the UTU strike, and it is at this point that I respectfully part company with the court.

What is really involved in this case is this: whether UTU, displeased with ICC approval of BN's sale of a section of its rail lines to MRL, may bypass the ICC and direct its displeasure at BN for the singular purpose of extracting concessions that are at odds with the terms of the ICC order. I think not, and I believe my view is at the heart of the decision in *Missouri Pacific Railroad v. United Transportation Union*, 782 F.2d 107 (8th Cir. 1986) (per curiam), *cert. denied*, 107 S. Ct. 3209 (1987) (*MoPac*). In adopting the district court's decision permitting the injunction, the court in *MoPac* stated:

[A]llowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest. \* \* \* [I]t is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired.

*Id.* at 112.

It is apparent a UTU strike here would be aimed at obtaining the essential equivalent of the same labor protective conditions UTU is actively seeking from the ICC. I am persuaded that in these circumstances, just as in

cases in which protective conditions are mandatory, the NLGA cannot be used to thwart an ICC order approving the BN-MRL transaction. When viewed from this perspective the potential conflict, while undoubtedly relating to BN's relationship with its employees, does not bear the characteristics of an NLGA section 104 labor dispute. I believe Congress, through the ICA, has granted the ICC authority (subject to judicial review) to resolve conclusively the issues UTU seeks to raise by way of the threatened strike.

In sum, the UTU strike threat amounts to an unacceptable neutralization of congressional policy in favor of the ICC's exercise of expert authority to serve the public interest in the area of railroad service. I believe the provisions of the ICA embody the greater interest when a dispute involving a railroad and its employees has been triggered by an order of the ICC. In these circumstances, the competing aspects of the ICA and the NLGA should have been resolved by the district court in favor of the ICA. Thus, I would reverse the district court's order disclaiming jurisdiction to consider BN's injunction request.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

# APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 87-5071

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RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Appellant,*

v.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY  
and DAKOTA, MINNESOTA AND EASTERN RAILROAD,  
*Appellees.*

STATE OF SOUTH DAKOTA,  
*Amicus Curiae/Appellee.*

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Appeal from the United States District Court  
for the District of Minnesota

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Submitted: December 18, 1987

Filed: May 31, 1988

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Before LAY, Chief Judge, and HEANEY and MAGILL,  
Circuit Judges.

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HEANEY, Circuit Judge.

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In this appeal, the Railway Labor Executives' Association (RLEA) asks the Court to reverse the decision of the United States District Court for the District of Minnesota. The district court refused to enjoin the sale of a section of trackage by the Chicago & Northwestern Transportation Company (C&NW) to the Dakota, Minnesota & Eastern Railroad (DM&E) until C&NW exhausted the mandatory bargaining requirements of the Railway Labor Act, 45 U.S.C. §§ 151-188 (RLA). Because we find the RLA in this circumstance superseded by the authority of the Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (ICA), we affirm the district court.

C&NW had sought for many years to divest itself of certain marginal or light density rail lines in South Dakota. Normally, the sale or abandonment of rail lines is subject to the approval of the Interstate Commerce Commission (ICC). See 49 U.S.C. § 10901, 10903, 10905. The ICC had in the past refused to allow C&NW to rid itself of ~~these~~ rail lines because of the adverse impact of such action on the State of South Dakota.

In January, 1986, the ICC, in an ex parte rulemaking procedure, exempted as a class the sale of rail lines to "new carriers" from the prior approval requirements of the ICA. See *Ex Parte No. 392 (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1986), review denied sub nom. *Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (*Ex Parte No. 392*). Following this change in ICC policy, C&NW agreed on July 2, 1986, to sell 826 miles of its rail lines and assign 139 miles of its South Dakota trackage to DM&E, a newly formed railroad.

Beginning in May of 1986, when they learned of the railroad's intention to sell, seven of the unions representing C&NW employees served notices on the C&NW as required under Section 6 of the RLA, 45 U.S.C. § 156.

These notices informed C&NW of the unions' intention to negotiate agreements to require both advance notification of any proposed transfer of rail lines and appropriate employee protective conditions. The unions further sought to obtain a pledge by C&NW to require DM&E to employ C&NW employees, to assume C&NW's collective bargaining obligations, and to apply appropriate employee protective arrangements. Under the terms of the RLA, these notices set in motion a lengthy bargaining process during which the status quo, i.e., the "actual objective working conditions" in existence at the beginning of the dispute, must be preserved. *Detroit & T. Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149, 153 (1969).

While the parties engaged in discussions, C&NW continued with its plans to sell the South Dakota lines. Pursuant to this goal, both the C&NW and the DM&E filed verified notices with the ICC under *Ex Parte No. 392* to qualify for exemption from prior approval requirements. Once it became apparent that C&NW intended to consummate the sale, notwithstanding the fact that it had not complied with the mandatory bargaining requirements of the RLA, RLEA, an umbrella organization made up of representatives of the various rail unions representing C&NW employees, filed a complaint in the United States District Court for the District of Minnesota on August 19, 1986. In its complaint, RLEA sought a declaratory judgment that C&NW had an obligation under the RLA both to bargain over the proposed transfer and to maintain the status quo until that bargaining was concluded. RLEA also sought interlocutory and then permanent injunctive relief requiring C&NW to bargain and maintain the status quo. C&NW replied that the mandatory bargaining requirements of the RLA were preempted by the provisions of the ICA governing sales and labor protective conditions.

On August 27, 1987, the district court denied RLEA's motion for a preliminary injunction, declaring such re-

lief would "be clearly at loggerheads with the decision of the ICC, particularly as expressed in *Ex Parte* 392." Shortly after that ruling, C&NW and DM&E consummated the sale, and on September 5, 1987, DM&E began operating over its newly acquired trackage. Once the sale was consummated, RLEA concentrated its attack on C&NW's bargaining obligation and duty to maintain the employment status quo of its employees whom RLEA asserted were improperly affected. Both sides moved for summary judgment. On January 7, 1987, the district court orally denied RLEA's motion, again finding that the ICC's action in *Ex Parte* No. 392 would be undermined if the provisions of the RLA were enforced and C&NW was required to bargain with the railroad unions. This appeal followed.

In *Burlington Northern R.R. v. United Transp. Union*, No. 87-2851, slip op. (8th Cir. May 31, 1988), a case decided today involving a similar railroad transaction exempted under *Ex Parte* No. 392 from normal ICC approval requirements, we held that the provisions of the ICA governing labor protective agreements supersede the mandatory bargaining requirements of the RLA. Specifically, we stated:

Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring "fair wages and working conditions in the railroad industry." 49 U.S.C. § 10101a(12). To accomplish this important *but limited aim*, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines. Yet it did so only insofar as this authority is necessary to "assure fair wages and working conditions" in order to ensure the free flow of commerce. In these narrow circumstances, the ICA supersedes the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping

process designed to reach labor protective agreements.

*Id.* at 12.

The RLEA's claim would require us to invoke the mandatory bargaining provisions of the RLA. Because in the present circumstances these provisions are superseded by the ICA, we affirm the decision of the district court.

LAY, Chief Judge, dissenting.

I respectfully dissent. I cannot agree that the Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (1982) (ICA), was intended to supersede the mandatory bargaining requirements of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982) (RLA). I do not believe that Congress intended the ICA proceedings to be a means of providing labor security and protection which is inherent under the mandatory bargaining procedure of the RLA. The ICA focuses on national transportation policy. See 49 U.S.C. § 10101a. Although the interest of labor may be asserted in proceedings before the Interstate Commerce Commission (ICC), I agree with the Third Circuit's view that it is highly unlikely "that Congress intended that rail labor look for its sole protection to an agency that lacks expertise in this field." *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, No. 87-3797, slip op. at 56 (3d Cir. Apr. 8, 1988). It is clear to me that the ICC lacks expertise in the field of labor security. I respectfully conclude that Congress did not intend to include labor protective conditions within the ICC proceedings so as to supersede labor's protective mechanisms under the Railway Labor Act.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

**APPENDIX C**

**Railway Labor Executives' Association  
Member Organizations**

American Railway & Airway Supervisors' Association  
(Division of TCU) ;  
American Train Dispatchers' Association;  
Brotherhood of Locomotive Engineers;  
Brotherhood of Maintenance of Way Employes;  
Brotherhood of Railroad Signalmen;  
Brotherhood of Railway Carmen (Division of TCU) ;  
Hotel Employees and Restaurant Employees International  
Union;  
International Association of Machinists and Aerospace  
Workers;  
International Brotherhood of Boilermakers and  
Blacksmiths;  
International Brotherhood of Electrical Workers;  
International Brotherhood of Firemen & Oilers;  
International Longshoremen's Association;  
National Marine Engineers' Beneficial Association;  
Railroad Yardmasters of America (Department of  
UTU) ;  
Seafarers' International Union of North America;  
Sheet Metal Workers' International Association;  
Transport Workers Union of America;  
Transportation • Communications Union (TCU) ; and  
United Transportation Union.

IN THE  
*SUPREME COURT OF THE UNITED STATES*  
October Term, 1987

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THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
Petitioner,  
v.  
RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
Respondent.

---

**PETITIONER'S SUPPLEMENTAL BRIEF**

---

Richard L. Wyatt, Jr.  
Akin, Gump, Strauss, Hauer  
& Feld  
1333 New Hampshire Ave., N.W.  
Washington, D.C. 20036  
(202) 887-4000  
(Counsel of Record)

G. Edward Yurcon  
The Pittsburgh & Lake Erie  
Railroad Company  
780 Commerce Court  
Four Station Square  
Pittsburgh, Pennsylvania 15219  
(412) 263-3806  
(Counsel for Petitioner)

Ronald M. Johnson  
Mary Qualiana  
Akin, Gump, Strauss, Hauer  
& Feld  
1333 New Hampshire Ave., N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 887-4000

---

Date: April 27, 1988

Pursuant to Rule 22.6 of the Rules of the Supreme Court of the United States, Petitioner, The Pittsburgh & Lake Erie Railroad Company ("P&LE"), hereby files this Supplemental Brief to inform the Court of a recent development in this case.

P&LE filed a petition for a writ of certiorari on March 24, 1988, seeking review of an October 26, 1987 opinion of the United States Court of Appeals for the Third Circuit. At the time of the filing of P&LE's petition for certiorari, the Third Circuit had under review a related, second appeal in this case. On April 8, 1988 (after P&LE had filed its petition) the Third Circuit issued its opinion in this second appeal,<sup>1</sup> denying P&LE's request for reversal of the decision of the United States District Court for the Western District of Pennsylvania.

P&LE intends to file another petition for certiorari within the next several weeks seeking review of the second and final Third Circuit decision in this action.<sup>2</sup> The important issues raised by each decision in this case independently warrant review, and may, in the Court's discretion, warrant consolidated review, as they arise out of a common set of facts. In the first appeal, the Third Circuit considered whether Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, deprived the district court of jurisdiction to enjoin a strike designed to block the sale of a railroad, when that sale had been authorized by the ICC. In the second appeal, the court considered whether a railroad that plans to go completely out of business as a railroad has a duty to exhaust the Railway Labor Act's protracted

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<sup>1</sup> Copies of this decision will be filed with P&LE's Supplemental Brief.

<sup>2</sup> The Interstate Commerce Commission ("ICC") was a party to this second appeal, and the United States may also file a petition for certiorari. The National Railway Labor Conference has filed an amicus brief in support of P&LE's first petition for certiorari and is likely to file in support of the next petition.

bargaining requirements before it completes a sale of its assets, when that decision has been authorized by the ICC, which has exclusive jurisdiction to approve the sale and to protect the legitimate interests of labor. In both instances, P&LE argued that the Interstate Commerce Act governed the transaction and prevented the unions' attempt to block the sale, either by strike or by the assertion of inconsistent Railway Labor Act obligations.

In its second decision, the Third Circuit expressly recognized that P&LE may, as a result of its decision, soon be forced into financial ruin, stating:

We are fully aware of the unfortunate ramifications and irony of our decision. A bargaining order, and a status quo injunction, designed to foster conciliation, promote labor peace, and ultimately keep the rails running, may ultimately have the perverse effect of destroying the only chance P&LE has for survival and perhaps even the very jobs that the unions are now trying to protect.

Slip op. at 57.

P&LE intends to file a Motion for Expedited Consideration with its second petition for certiorari, asking the Court to consider both petitions in time for the case to be heard in the early fall. As will be explained more fully in that Motion, P&LE will request that the Court review and decide these issues during the fall term. P&LE must determine, at the earliest possible date, whether it has the right to sell its railroad assets to the buyer of its choice on its terms or whether its only options are as they stand now; *i.e.*,

liquidation or, if possible, the sale of the railroad to a buyer under terms approved by all fourteen of P&LE's unions.

Respectfully submitted,

Richard L. Wyatt, Jr.  
Akin, Gump, Strauss, Hauer  
& Feld  
1333 New Hampshire Ave., N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 887-4000  
(Counsel of Record)

Ronaid M. Johnson  
Mary Qualiana  
(Counsel for Petitioner)

G. Edward Yurcon  
The Pittsburgh & Lake Erie  
Railroad Company  
780 Commerce Court  
Four Station Square  
Pittsburgh, Pennsylvania 15219  
(412) 263-3806  
(Counsel for Petitioner)

Dated: April 27, 1988

Supreme Court, U.S.

FILED

JUN 22 1988

JOSEPH E. SPANIOLO, JR.  
CLERK

No. 87-1589

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IN THE  
*SUPREME COURT OF THE UNITED STATES*  
October Term, 1987

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THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
Respondent.

---

PETITIONER'S REPLY BRIEF

---

G. Edward Yurcon  
The Pittsburgh & Lake Erie  
Railroad Company  
780 Commerce Court  
Four Station Square  
Pittsburgh, Pennsylvania 15219  
(412) 263-3806  
(Counsel for Petitioner)

Richard L. Wyatt, Jr.  
(Counsel of Record)  
Ronald M. Johnson  
Jonathan A. Gruver  
Akin, Gump, Strauss, Hauer  
& Feld  
1333 New Hampshire Ave., N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 887-4000

---

Date: June 21, 1988

Pursuant to Rule 22.5 of the Rules of the Supreme Court of the United States, Petitioner, The Pittsburgh & Lake Erie Railroad Company ("P&LE"), hereby files this brief in reply to the brief submitted by Respondent Railway Labor Executives' Association ("RLEA") in response to the petition.

Respondent agrees that the issue presented by this case ("*P&LE I*") is one that is extremely important to the entire rail industry (Response at 7, 9). However, RLEA asks this Court to withhold a decision on P&LE's petition until the Court resolves the petition in two other cases presenting the issue of whether the Interstate Commerce Commission's ("ICC") jurisdiction under the Interstate Commerce Act ("ICA") supersedes inconsistent requirements of the Railway Labor Act ("RLA"), *Pittsburgh & Lake Erie Railroad Co. v. RLEA*, Sup. Ct. No. 87-1888 ("*P&LE II*"), and *RLEA v. Guilford Transportation Industries, Inc.*, Sup. Ct. No. 87-1911. In its subsequent response to P&LE's petition in *P&LE II*, No. 87-1888, RLEA agrees that petition is certworthy, but now argues that *RLEA v. Guilford Transportation Industries, Inc.*, or *RLEA v. Chicago & North Western Transportation Co.*, Sup. Ct. No. 87-2049, not *P&LE II*, is its preferred vehicle for resolution of the interplay of the ICA and RLA. As P&LE explains here, and in its Reply in No. 87-1888, also filed this day, the Court should not defer consideration of *P&LE I* and *II*, but should consolidate those petitions and give them priority consideration.

First, the disputes between rail labor and management arising from the sale of lines of railroads involve the interplay of the ICA, RLA and Norris-LaGuardia Act. Efficient resolution of this interplay does not lend itself to a piecemeal examination as RLEA suggests. Of the three railroad line sales which have

spawned these four petitions for certiorari, only P&LE's sale presents both the issue of whether the ICA supersedes inconsistent RLA requirements and the accommodation of the ICA and Norris-LaGuardia Act.

Second, *P&LE I* and *II* should not be deferred until the Court resolves *Guilford*, because resolution of *Guilford* will not necessarily determine the outcome of *P&LE I* and *II* or other line sale cases. The transaction that was the subject of *Guilford* was governed by Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a), which expressly preempts all other laws. While P&LE does not believe an express preemption is necessary, the sale of P&LE's lines, and other pending line sale cases, were governed by a different section of the ICA, 49 U.S.C. § 10901. P&LE would also note that this Court recently denied a rail union petition for certiorari from a decision virtually identical to *Guilford*, *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S. Ct. 111 (1986).

Third, of all of the line sale cases, only P&LE's case involves the scope of the RLA's bargaining and status quo obligations when an employer is going completely out of business as a railroad. These issues were not addressed in *Guilford* or *Chicago & North Western*, because the appellate courts there held the ICA preempted any RLA bargaining requirements.<sup>1</sup> Additionally, those cases involved railroads seeking to sell only a part of their systems. Thus, even if this Court decided the ICA preemption issue in favor of the unions, such a result would not dispose of P&LE's case. Moreover, resolution of the bargaining and status quo obligations as advocated by P&LE would avoid a conflict between the ICA and

<sup>1</sup> Nor were they addressed in *Burlington Northern R.R. Co. v. United Transportation Union*, Nos. 87-2581 & 87-2600 (8th Cir. May 31, 1988), *petition for reh'g en banc* filed, (June 10, 1988), for similar reasons.

RLA on the facts of P&LE's case. If, as P&LE believes, an employer has an absolute right to go out of business, then the RLA obligations may not be present here. *Cf. Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965). The bargaining and status quo issues presented by P&LE are of vital interest and have never before been addressed by the Court in the context of the RLA.<sup>2</sup>

Finally, and of vital consideration to P&LE, if P&LE is to have meaningful Supreme Court review, that review must come soon. As P&LE previously explained and the lower courts found, it is in dire financial straits. It is ironic that RLEA and the ICC<sup>3</sup> present this as an excuse for selection of their favored cases as the proper vehicle for Supreme Court review. The fact that P&LE must find a buyer or face liquidation or bankruptcy is a compelling reason to give P&LE's case priority, not for further delay to hear cases involving railroads which do not face economic catastrophe.

In that regard, only P&LE's case presents a constitutional issue which Respondent would choose to have this Court ignore. That issue, whether an order indefinitely prohibiting a railroad that is operating at a loss from going out of business until it completes the bargaining procedures of the RLA constitutes an unjust taking of property in violation of the Fifth Amendment, is not presented by

<sup>2</sup> Given partial economic deregulation of the railroad industry and complete deregulation of the airline industry, these issues will likely arise with greater frequency as companies will be more likely to fail due to the greater play of market forces.

<sup>3</sup> The ICC, in a memorandum filed in *P&LE II*, suggests that all petitions be held in abeyance until *Burlington Northern R.R. Co. v. United Transportation Union* reaches the Supreme Court. *See supra*, note 1. As explained more fully in P&LE's Reply in No. 87-1888, P&LE vigorously opposes the ICC's suggestion. It is problematic when that case will reach this Court. In any event, the issues present there are already in *P&LE I* and *II*.

any of the other cases for which review has been sought and is an independent ground for this Court to grant review in P&LE's case.

Petitioner respectfully submits that for the foregoing reasons, this Court should not defer consideration of this petition until the petitions in the other cases are ready to be reviewed later this year, but should instead resolve this petition now by issuing a writ of certiorari to the Third Circuit, granting review of its decision in this matter and in *P&LE II*.

Respectfully submitted,

Richard L. Wyatt, Jr.

(Counsel of Record)

Ronald M. Johnson

Jonathan A. Gruver

(Counsel for Petitioner)

AKIN, GUMP, STRAUSS, HAUER  
& FELD

1333 New Hampshire Avenue, N.W.  
Suite 400

Washington, D.C. 20036

(202) 887-4000

G. Edward Yurcon

(Counsel for Petitioner)

The Pittsburgh & Lake Erie  
Railroad Company

780 Commerce Court

Four Station Square

Pittsburgh, Pennsylvania 15219

(412) 263-3806

Dated: June 21, 1988

**In the Supreme Court of the United States**

OCTOBER TERM, 1988

Supreme Court, U.S.

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**NOV 10 1988**

**JOSEPH E. SPANIOLO, JR.**

**CLERK**

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, PETITIONER

*v.*

RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, PETITIONER

*v.*

RAILWAY LABOR EXECUTIVES' ASSOCIATION, AND THE  
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

INTERSTATE COMMERCE COMMISSION, PETITIONER

*v.*

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY AND THE  
RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

INTERSTATE COMMERCE COMMISSION, PETITIONER

*v.*

THE UNITED TRANSPORTATION UNION,  
THE BURLINGTON NORTHERN RAILROAD COMPANY, AND  
THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

ON PETITIONS FOR WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD AND EIGHTH CIRCUITS

**MEMORANDUM OF THE INTERSTATE COMMERCE COMMISSION**

ROBERT S. BURK

*General Counsel*

HENRI F. RUSH

*Deputy General Counsel*

JOHN J. MCCARTHY, JR.

*Deputy Associate General Counsel*

CLYDE J. HART, JR.

*Attorney*

*Interstate Commerce Commission*

*12th & Constitution Ave., N.W.*

*Washington, D.C. 20423*

*202/275-7009*

NOVEMBER 1988

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

---

Nos. 87-1589, 87-1888, 88-217 and 88-711

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, PETITIONER

*v.*

RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

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THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, PETITIONER

*v.*

RAILWAY LABOR EXECUTIVES' ASSOCIATION, AND THE  
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

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INTERSTATE COMMERCE COMMISSION, PETITIONER

*v.*

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY AND THE  
RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

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INTERSTATE COMMERCE COMMISSION, PETITIONER

*v.*

THE UNITED TRANSPORTATION UNION,  
THE BURLINGTON NORTHERN RAILROAD COMPANY, AND  
THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

---

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD AND EIGHTH CIRCUITS*

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**MEMORANDUM OF THE INTERSTATE COMMERCE COMMISSION**

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This memorandum responds to the amicus brief on the merits filed by the Solicitor General on November 7, 1988, in Nos. 87-1589 and 87-1888. It also responds to

the suggestion filed by Railway Labor Executives' Association (RLEA) (letter to the Court dated November 2, 1988) that the controversy out of which the Commission's petition in No. 88-711 arises may become moot, by virtue of Burlington Northern Railroad's (BN) management having capitulated to the demands of its employees for conditions upon its proposed sale of a rail line to Montana Rail Link (MRL) as the only means remaining which would permit carrying into effect the Commission authorized transaction.

1. We are pleased that the Solicitor General has added his voice to those of all others associated with this country's rail industry in urging this Court to decide the issues of the relationship of the Interstate Commerce Act, 49 U.S.C. 10101 et seq., (ICA) and Commission orders authorizing transactions thereunder to (1) the duty to negotiate under the Railway Labor Act, 45 U.S.C. 151 et seq. (RLA), and (2) the ability of courts to enjoin strikes which threaten to negate or unilaterally modify the terms of Commission authorized transactions. Since the *P&LE I* and *P&LE II* decisions of the Third Circuit below, the Commission's program to foster the formation of shortline and regional railroads, which the court below itself recognized was consistent with the will of Congress and in the public interest has come to a virtual standstill.<sup>1</sup>

Concomitantly, during the same period, abandonment applications have increased for the first year since the program has been in effect. Plainly such a result serves

<sup>1</sup> As the Commission has noted in prior submissions to the Court in these proceedings the number of new railroad formations since the Third Circuit's decisions has fallen by 50%. Moreover, the rail track mileage encompassed in 49 U.S.C. 10901 *Class Exemption* filings has fallen by 85%.

no one's interest. The sooner this Court can act to straighten out the morass created by the decisions below the better for all concerned.

2. We are somewhat surprised that the Solicitor General continues to insist, however, in deciding these issues of seminal importance to the industry and to the Commission's performance of its approval and oversight functions, that the Commission's petition should not be heard by the Court. The court below granted the Commission amicus and subsequently full intervenor status in recognition of the importance of ascertaining the Commission's views. Moreover, the quotation from the court below chosen by the Solicitor General to support his position (with which we agree) that the *P&LE* cases are not moot (Brief of the United States, pp. 9-10, fn.8) presupposes that the Commission is a proper party to these proceedings whose views, among others, ought to be taken into account.

3. It is the Commission's position that 88-711 is not made moot by virtue of the settlement between BN and UTU. That settlement, far from mootng the Commission's petition in No. 88-711, underscores the urgency of this Court resolving the issues presented. By holding itself unable to enjoin a strike, the majority of the panel below has given to rail labor the power to dictate the terms upon which transactions authorized by the Commission as in the public interest will go forward—if at all. See, e.g., *P&LE v. RLEA*, No. 87-1888, where the transaction authorized by the Commission has been effectively negated. This situation represents a continuing affront to, and usurpation of, the exclusive authority vested in the Commission by Congress to approve transactions relating to consolidations, sales and other dispositions of rail assets in the rail industry. This in and of

itself would permit the Court to conclude that the controversy is a continuing one and not mooted by settlement.

Furthermore, as the Commission stated in its reply to the opposition in No. 88-217, the controversy arising out of the Commission's claim that the ICA must preempt other laws which act as obstacles to transfers under 49 U.S.C. 10901 is "capable of repetition yet evading review" *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911). Clearly, until this Court resolves these issues the orders of the Commission will continue to be subject to this challenge. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), quoting *Sosna v. Iowa*, 419 U.S. 393 (1975).

4. However, because of the possibility of settlement in *BN v. UTU*, 848 F.2d 856 (8th Cir. 1988) in which RLEA represents that all parties other than the Commission will agree not to file for review by this Court, and because of the urgency of the situation in the industry, and because all relevant parties appear to be ready to move forward on the *P&LE* petitions, the Commission now agrees that the *P&LE* petitions represent the best vehicle for the resolution of the critical issues of the relationship of the ICA, RLA and the Norris-LaGuardia Act, 29 U.S.C. 101 et seq. (NLGA) presented in the Commission's petitions in Nos. 88-217 and 88-711.

## CONCLUSION

For the reasons set forth herein, petitions for writs of certiorari to the United States Court of Appeals for the Third Circuit filed by the Pittsburgh and Lake Erie Railroad Company in Nos. 87-1589 and 87-1888 and by the Commission in No. 88-217 should be granted, and the cases should be consolidated and set for briefing and argument as expeditiously as possible.

ROBERT S. BURK  
General Counsel

HENRI F. RUSH  
Deputy General Counsel

JOHN J. MCCARTHY, JR.  
Deputy Associate General Counsel

CLYDE J. HART, JR.

Attorney  
Interstate Commerce Commission  
12th & Constitution Ave., N.W.  
Washington, D.C. 20423  
202/275-7009

NOVEMBER 1988

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JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*  
v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,  
*Respondents.*

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,  
*Petitioners,*  
v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,  
*Respondents.*

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,  
*Petitioners,*  
v.

CHICAGO & NORTH WESTERN TRANSPORTATION  
COMPANY, *et al.*,  
*Respondents.*

On Petitions for Writs of Certiorari to the  
United States Courts of Appeals for the  
First, Third, Seventh and Eighth Circuits

**SUPPLEMENTAL BRIEF FOR  
RAILWAY LABOR EXECUTIVES' ASSOCIATION**

WILLIAM G. MAHONEY  
JOHN O'B. CLARKE, JR.\*  
HIGHSAW & MAHONEY, P.C.  
Suite 210  
1050 17th Street, N.W.  
Washington, D.C. 20036  
*Attorneys for Railway Labor  
Executives' Association*

Date: November 18, 1988 \* Counsel of Record

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

Nos. 87-1589, 87-1888, 87-1911, 87-2049 and 88-464

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
v. *Petitioner,*

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,  
*Respondents.*

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,  
v. *Petitioners,*

GUILFORD TRANSPORTATION INDUSTRIES, INC., et al.,  
*Respondents.*

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,  
v. *Petitioners,*

CHICAGO & NORTH WESTERN TRANSPORTATION  
COMPANY, et al.,  
*Respondents.*

**On Petitions for Writs of Certiorari to the  
United States Courts of Appeals for the  
First, Third, Seventh and Eighth Circuits**

**SUPPLEMENTAL BRIEF FOR  
RAILWAY LABOR EXECUTIVES' ASSOCIATION**

This supplemental brief is respectfully submitted by the Railway Labor Executives' Association [hereinafter, "RLEA"], pursuant to Rule 22.6 of the Rules of this Court, to present an overview of the pending petitions,

and in response to certain arguments made by the United States as an *amicus curiae* in Nos. 87-1589 and 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*. This brief is also being submitted to bring to this Court's attention certain recent developments affecting No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*

### 1. OVERVIEW OF PENDING CASES

Since March 24, 1988, when the petition for a writ of certiorari was filed in No. 87-1589, *Pittsburgh & Lake Erie R.R. v. RLEA*, a total of eight (8) petitions have been filed with this Court seeking writs of certiorari for this Court to review various issues arising from the rail industry's reliance upon the powers of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] over rail financial transactions, to assert that the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, relieves our nation's railroads of their bargaining and status quo obligations under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* While those petitions raise many different issues, RLEA, which is a party to each case, submits that the cases may be grouped into the following four categories by the issues which they present.

#### A. Collateral Attack Issues

Although the railroads have asserted throughout this litigation that the Interstate Commerce Act operates to relieve them of any "overlapping" obligation under the Railway Labor Act, the courts first relied upon the collateral attack concept to deny rail labor's efforts to enforce the Railway Labor Act's notice, bargaining and status quo commands. *E.g.*, *RLEA v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987). That collateral attack issue is currently before this Court in five (5) of the eight petitions: No. 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*; No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*; No. 87-2049, *RLEA v. Chicago & North Western Transpor-*

*tation Co.*; No. 88-217, *ICC v. Pittsburgh & Lake Erie R.R.*; and No. 88-517, *City of Galveston v. RLEA*.

Of those five cases, RLEA submits that the *Guilford* case presents the best vehicle, for *Guilford* presents the collateral attack issue in a factual situation where the ICC imposed employee protections which the carriers asserted specifically authorized them to consummate the leases, notwithstanding the bargaining and status quo commands of the Railway Labor Act. *See, BLE v. Boston and Maine Corp.*, 788 F.2d 794, 800-01 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986). This case, therefore, presents not only the general collateral attack issue which arises when rail labor seeks to enforce the Railway Labor Act in cases involving ICC orders exempting a financial transaction, but the additional question of whether the imposition of employee protections requires a different result. This additional issue is highly relevant because some courts have relied upon the presence of ICC imposed protective conditions to conclude that enforcement of the Railway Labor Act's major dispute resolution processes would constitute a collateral attack on an ICC decision imposing specific conditions to protect employee interests. *BLE v. Boston and Maine Corp.*, *supra*, 788 F.2d at 800-02; *see, ICC Pet. in No. 88-711 at 14-15*. Thus, if this Court resolves the collateral attack issue presented by the pending petitions in a manner favorable to rail labor, but in a case in which employee protections were not imposed by the ICC, it is safe to assume that the ICC will then impose some minimal form of protection, such as the limited buyout offer involved in No. 88-464, *RLEA v. Chicago & North Western Transportation Co.*, and the courts will then be faced with the question of whether that fact makes enforcement of the Railway Labor Act a collateral attack on that ICC order.

In short, since the goal which the parties to the pending petitions are attempting to obtain is the final reso-

lution of as many vexing issues as possible, RLEA respectfully submits that *Guilford* should be one of the cases accepted for review.

In its brief to this Court as an *amicus* in Nos. 87-1589 and 87-1888, however, the United States asserts that it disagrees with RLEA that the *Guilford* case should be used as a vehicle to resolve any of the pending issues. U.S. Brief at 9 n.8. The United States takes that position because it assumes that the transactions in *Guilford* are subject to the express immunity granted by 49 U.S.C. § 11341(a) that, according to the Solicitor General, relieves a carrier participating in such “approved or exempted” transactions from any restraining or prohibitory law. *Id.* As the United States concludes: “Thus, the principles that govern transactions subject to Section 11341 are not necessarily applicable to transactions subject to Section 10901 and the *Ex Parte* No. 392 class exemption.” *Id.*

In asserting that Section 11341(a) applies to the lease exemptions involved in *Guilford*, the United States ignores the fact that Section 11341(a), by its express terms, applies only to “transaction[s] approved by or exempted by the Commission under this subchapter [*i.e.*, Sections 11341 to 11351] . . . .” 49 U.S.C. § 11341(a). Rail exemptions, such as those involved in *Guilford*, are granted under Section 10505, a section which is in an entirely different subchapter of the transportation statute. Moreover, as RLEA pointed out in its petition in No. 87-1911 (Pet. at 22-23), the import of the clear language of Section 11341(a) is supported by that section’s legislative history, and by the ICC’s holding in *Ex Parte* No. 282 (Sub-No. 9), *Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270, 279 (1985), that: “[S]ection 11341(a) does not apply to the [Section 11343(a)] transactions exempted” under Section 10505.

Once it is accepted that Section 11341(a) does not apply to the lease exemptions in *Guilford*, that case then

presents the same collateral attack and conflict of laws issues as are involved in the other cases, except, as explained above, it has the additional feature of the impact of ICC imposed protections on both issues. Therefore, RLEA submits, *Guilford* should be used as one of the vehicles to resolve both the collateral attack and conflict of laws issues.

RLEA recognizes, however, that the possibility exists that this Court may not agree with RLEA’s view of the law on the collateral attack issue, and therefore, RLEA agrees with the rail industry that at least one of the other pending collateral attack cases should also be accepted for review in the event that this Court concludes that the presence of employee protective provisions requires a different result than RLEA is advocating. As we have explained before, RLEA submits that its petition in No. 87-2049, *RLEA v. Chicago & North Western Transportation Co.*, should be that additional vehicle.

No. 87-1888 also presents a good vehicle for the non-employee protection collateral attack issue, but it suffers from one major defect.<sup>1</sup> Rail labor has been involved in negotiations with the Pittsburgh & Lake Erie Railroad [hereinafter, “P&LE”] and its creditors in an attempt to find a solution to the carriers’ financial plight. So far, those negotiations have been unsuccessful. However, as shown by the letter to counsel for RLEA from RLEA’s financial advisor, Mr. Brian M. Freeman, which has been lodged with this Court, it is possible that those efforts will be successful in the near future. A successful resolution of the current negotiations may include as part of the agreement the commitment of all parties (including RLEA and the P&LE) to dismiss “with prejudice” “all

<sup>1</sup> As explained below, RLEA’s hesitancy to recommend the grant of the petition in No. 87-1888 lies in the possibility that the parties may agree to settle before this Court reaches a decision on the merits. That possibility, however, is far from a certainty, and, thus, this Court may wish to grant the petition in No. 87-1888, as well, for concurrent briefing with Nos. 87-1911, 87-2049, and 88-464.

actions brought by Rail [*sic*] Labor Executives' Association ('RLEA') against PLE relating to the sale of PLE's assets . . . ." Freeman letter dated November 14, 1988 at attachment, p. 9, ¶ (g).

It was for this reason that RLEA stated in its response to the P&LE's petition in No. 87-1888, that "there is a substantial question as to whether this case will still present a justiciable issue later this year or early next year." RLEA Brief in No. 87-1888 at 5.<sup>2</sup> While RLEA continues to question whether this case will remain viable, we agree that it is currently justiciable. However, while RLEA has a clear interest in continuing to press the validity of the Third Circuit's decision, RLEA also has an obligation to the P&LE rail employees which may require it to agree to dismiss its underlying complaint as a condition for an overall settlement. That same possibility does not exist in No. 87-2049 or in No. 87-1911.

In short, on the collateral attack issue, RLEA suggests that this Court grant the petitions in Nos. 87-1911 and 87-2049, and that this Court hold Nos. 87-1888 and 88-517 in abeyance. *But see*, note 1, *supra*. RLEA continues to maintain that No. 88-217 should be denied.

#### B. Conflict Of Laws Issues

RLEA respectfully submits that the issue which lies at the heart of the pending cases, although it is not presented in each petition, is the question of whether the Interstate Commerce Act supersedes the Railway Labor Act. That issue is squarely presented by five of the peti-

<sup>2</sup> In its brief (U.S. Brief at 9 n.8), the United States asserts that RLEA has suggested that No. 87-1888 may become moot because the P&LE no longer intends to sell to its original prospective purchaser, P&LE Railco, Inc. That assertion is incorrect, for RLEA has contended before, and continues to assert, that this case (No. 87-1888) will not be moot so long as the P&LE may sell its assets before it has completed the Railway Labor Act's major dispute resolution processes. *See, RLEA v. P&LE*, 845 F.2d 420, 427-28 n.8 (3rd Cir. 1988), *pets. for cert. pending*, Nos. 87-1888 and 88-217.

tions: No. 87-1888, *P&LE v. RLEA*; No. 87-1911, *RLEA v. Guilford*; No. 87-2049, *RLEA v. Chicago & North Western*; No. 88-217, *ICC v. P&LE*; and No. 88-711, *ICC v. UTU*. Of those five cases, Nos. 88-217 and 88-711 do not merit review by this Court since the ICC, which is the petitioner in both, lacks standing. Of the remaining three, RLEA again suggests that Nos. 87-1911 and 87-2049 be used as the test vehicles.

#### C. Railway Labor Act Issues

Running throughout virtually all of these cases is the question of what specific Railway Labor Act obligations are presented and believed by the rail carriers to be in conflict with the Interstate Commerce Act. Only two of the pending cases, besides the ICC's petition in No. 88-217, present that question: No. 87-1888, *P&LE v. RLEA*, and No. 88-464, *RLEA v. Chicago & North Western Transportation Company*. However, a primary distinction between those two cases is that the *Chicago & North Western* case deals with a sale of part of a railroad, and thus, does not present the same bargaining issue which arises from the fact that the *P&LE* case involves a railroad's attempt to go completely out of the railroad business.<sup>3</sup> While RLEA submits that this fact should not make any difference, the Seventh Circuit in the *Chicago & North Western* case concluded that this was a distinguishing factor. *See*, No. 88-464, Pet. at 16a-17a n.3. Thus, if this Court is to resolve as many issues as possible so that rail labor and management will know what their rights are in line sale cases, this Court should grant the petition in No. 88-464.

Another reason for granting the petition in No. 88-464 is that this case is the only one of the eight petitions which squarely presents the recently prevalent "minor

<sup>3</sup> It should be noted that the P&LE did not intend to dissolve, but simply to sell its rail lines and facilities and remain viable as a rail car leasing and real estate entity.

dispute" question. Since the contractual provisions upon which the C&NW relied in No. 88-464 to argue that the underlying controversy was a minor dispute, are common contractual provisions throughout the entire rail industry (*see*, RLEA Reply Brief in No. 88-464 at 6 n.1), it stands to reason that other carriers will advance an identical minor dispute defense in line sale cases. Indeed, this has already occurred, for in the two remaining district court cases arising from line sales, the carriers have raised that identical argument. One case is still pending, *RLEA v. Burlington Northern R.R.*, W.D.Mo. Civil Action No. 87-0696-CV-W-8, but in the other, the court relied upon the Seventh Circuit's *Chicago & North Western* decision to conclude that rail labor's claims raised only a minor dispute, even though Section 6 notices had been served by several unions. *Atchison, Topeka & Santa Fe Ry. v. RLEA*, N.D.Ill Civil Action Nos. 87 C 9847 and 87 C 9969, decided October 25, 1988.

A resolution of the question presented as to the scope of the status quo obligation is important to the conflict of laws issue. This is so because, obviously a conclusion that a carrier has an obligation to bargain over the effects of a sale on its employees, but that it is not precluded by the Act's status quo obligation from selling during that bargaining process, presents a different conflict issue than would be presented by the conclusion that the status quo obligation *does* preclude the sale before that bargaining is completed. Since No. 88-464 presents this issue, RLEA submits that the writ should be granted in that case.

#### D. Norris-LaGuardia Act Issue

Two of the pending cases present the additional issue of the relationship between the Interstate Commerce Act and the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* Those cases are: No. 87-1589, *P&LE v. RLEA*, and No. 88-711, *ICC v. UTU*. One of those cases, *ICC v. UTU*, does not present a case over which this Court has juris-

diction, and the other case suffers from the possible settlement problems inherent in No. 87-1888. RLEA has previously suggested that this Court hold No. 87-1589 in abeyance, and it continues to make that suggestion for the reasons set forth in its response to No. 87-1589.

#### 2. RECENT EVENTS AFFECTING NO. 87-1911

In its earlier supplemental briefs in No. 87-1911, RLEA informed this Court that on June 12, 1988, an arbitrator issued an award which may affect the continued justiciability of No. 87-1911. That award—the Implementing Agreement award—is the subject of a review petition before the ICC. On November 15, 1988, the ICC conducted a public voting conference on that petition, and three of the five Commissioners voted to set aside that award insofar as it required the Springfield Terminal Railway Company to apply the rates of pay and work rules of the lessor carriers to the employees operating the leased lines. According to the statements made by the Commissioners at the voting conference,<sup>4</sup> they voted to set aside that portion of the award because the arbitrator's award limited the "management flexibility" which Guilford had hoped to achieve by the leases. As RLEA explained in its Supplemental Brief of September 30, 1988, at 4-5, that management flexibility was to be achieved through the abrogation of the lessors' collective bargaining agreements. However, rather than impose the Springfield Terminal work rules, the ICC voted to require the parties to negotiate, with the arbitrator acting as a mediator, the issue of the proper construction of the Springfield Terminal-United Transportation Union collective bargaining agreement, and the issue of what work rules should govern the lease operations. If the parties are unable to agree, then the "arbitrator"

<sup>4</sup> RLEA has ordered a transcript of the voting conference and once it is obtained (at present, it is scheduled to be delivered on Monday, November 21, 1988), RLEA will lodge it with this Court.

is to submit to the Commission a recommended decision on those issues which the ICC will then review to devise the new collective bargaining "agreement." RLEA recognizes, however, that the full import of what the Commission will order in that case will not be known until it issues its written decision and order.

### CONCLUSION

For the reasons set forth in RLEA's earlier pleadings, RLEA respectfully submits that this Court should grant the petitions in Nos. 87-1911, 87-2049 and 88-464.

Respectfully submitted,

WILLIAM G. MAHONEY  
JOHN O'B. CLARKE, JR.\*  
HIGHSAW & MAHONEY, P.C.  
Suite 210  
1050 17th Street, N.W.  
Washington, D.C. 20036  
*Attorneys for Railway Labor  
Executives' Association*

Date: November 18, 1988 \* Counsel of Record

(9) (12)  
Nos. 87-1589 & 87-1888

Supreme Court, D.C.  
**FILED**  
NOV 22 1988

JOSEPH F. SPANOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
INTERSTATE COMMERCE COMMISSION,  
*Respondents.*

**PETITIONER'S SUPPLEMENTAL BRIEF**

G. Edward Yurcon  
THE PITTSBURGH & LAKE ERIE  
RAILROAD COMPANY  
780 Commerce Court  
Four Station Square  
Pittsburgh, Pennsylvania 15219  
(412) 263-3806  
*(Counsel for Petitioner)*

Richard L. Wyatt, Jr.  
*(Counsel of Record)*  
Ronald M. Johnson  
AKIN, GUMP, STRAUSS, HAUER  
& FELD  
1333 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
(202) 887-4000

November 22, 1988

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The Pittsburgh & Lake Erie Railroad Company ("P&LE") respectfully submits this Supplemental Brief, pursuant to Rule 22.6 of the Rules of this Court, in response to new arguments and factual assertions raised by the Railway Labor Executives' Association ("RLEA") in its Supplemental Brief filed in reference to *The Pittsburgh & Lake Erie Railroad Company v. Railway Labor Association*, No. 87-1589 ("*P&LE I*") and No. 87-1888 ("*P&LE II*"). RLEA's Supplemental Brief, filed on the eve of what P&LE hopes is the definitive conference, is RLEA's latest tactic in its by now obvious effort to frustrate P&LE's attempts to obtain prompt Supreme Court review of its cases.<sup>1</sup>

RLEA's latest Brief suggests that *P&LE I* and *II*, while offering this Court a single opportunity to consider all the issues raised in the other pending cases, nonetheless "suffer( ) from one major defect." RLEA Supplemental Brief at 5. The alleged defect is that the *P&LE* cases may be rendered moot by what RLEA characterizes as "negotiations" between itself, P&LE, and P&LE's creditors that are designed to "find a solution to the carriers' (sic) financial plight." *Id.* Thus, because a "successful resolution" of

<sup>1</sup> The letter from RLEA's financial advisor that is referred to and upon which RLEA bases its assertion that *P&LE II* may become moot was not made available to P&LE until 9:30 A.M. on Monday, November 21, 1988, four days after the filing of RLEA's latest Supplemental Brief. P&LE's weekend request for a copy of the letter from counsel for RLEA went unheeded. Thus, P&LE has been forced to respond in extremely short order to RLEA's ploy. RLEA's "eleventh-hour" filing of the Supplemental Brief and letter to this Court are the latest example of the tactics of delay that RLEA has pursued throughout this litigation. See Letter from Richard L. Wyatt, Jr. to Joseph F. Spaniol, Jr. (May 23, 1988) (discussing in detail past instances of RLEA delaying tactics) (attached hereto as Appendix A).

these "negotiations" may include an agreement by RLEA to dismiss all actions against P&LE, RLEA recommends that this Court accept as the vehicle for Supreme Court review several of the other pending cases.<sup>2</sup> *Id.* at 5-6. RLEA long ago acknowledged that *P&LE I* and *II* both presented to this Court all the issues worthy of review. Originally RLEA advocated, for reasons entirely different than those it now raises, that certiorari be granted in cases other than the *P&LE* cases. RLEA's latest attempt to avoid or postpone certiorari in both *P&LE I* and *P&LE II* is both disingenuous and, as a result of its deliberate timing, outrageous.<sup>3</sup>

The original sale of P&LE was frustrated as a result of the Third Circuit's affirmance of an order compelling the prospective

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<sup>2</sup> RLEA also asserts that the United States was mistaken in its *amicus* brief when it took the position that *RLEA v. Guilford Transp. Indus., Inc.*, No. 87-2049 (1st Cir. 1988), is not the proper vehicle for addressing the issues raised in *P&LE II* regarding rail transactions under § 10901 of the Interstate Commerce Act, ("ICA"). RLEA Supplemental Brief at 4. RLEA maintains that *Guilford* raises the same issues as *P&LE II* "once it is accepted" that the case did not involve § 11341(a) of the ICA. *Id.* However, the district court decided *Guilford* based on §§ 11341 and 11347. *See RLEA v. Guilford Transp. Indus., Inc.*, 667 F. Supp. 29, 34-36 (D. Me. 1987). Therefore, it is now inappropriate for RLEA to request that this Court treat *Guilford* as a case involving a § 10901 transaction. To do as the RLEA requests would force the Court to decide issues not raised or litigated in the lower courts which is something it is generally reluctant to do. *See Springfield v. Kibbe*, 480 U.S. 257, 258 (1987); *Miree v. DeKalb County*, 433 U.S. 25, 34 (1977); *California v. Taylor*, 353 U.S. 553, 556-57 n.2 (1957).

<sup>3</sup> RLEA's last-minute attempt to distract this Court from consideration of *P&LE I* and *II* by claiming it may soon become moot is without legal merit. The current controversy is among the class of disputes that are "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). The dilemma facing P&LE falls within this doctrine. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

purchaser of P&LE's assets to either assume the existing labor agreements and organizations or await the outcome of protracted Railway Labor Act, 45 U.S.C. § 151, *et seq.*, ("RLA"), bargaining procedures between P&LE and its unions. Since then P&LE has been forced to shop for a purchaser who was willing to accept all P&LE's employees, the labor unions, and their contracts as a condition of the purchase of P&LE's assets. There has been none.

In the seven months since the Third Circuit's decision in *P&LE II* there has been only one serious proposal to purchase P&LE. That proposal was jointly sponsored by RLEA and CSX Transportation, Inc. ("CSXT"), a major class I railroad. Cumbersome negotiations were undertaken involving CSXT and P&LE on the one hand and, on the other hand, RLEA, all 13 of P&LE's unions, and the proposed new company that would purchase the rail assets. Those negotiations lasted almost six months. The proposal ultimately foundered when RLEA was unable to obtain the agreement of all of P&LE's union to the terms of an agreement negotiated by RLEA's investment advisor. (Copies of the correspondence terminating the purchase agreement are attached hereto as Appendix B).

Contrary to the assertions made in the self-serving letter of RLEA's financial advisor, RLEA has not negotiated in order to "find a solution" to P&LE's financial plight. As noted in the Declaration of Gordon E. Neuenschwander, no purchaser is willing to buy the railroad's assets with the employee complement as it now exists. (Attached hereto as Appendix C). RLEA recognizes this fact and has used the appellate court order and the RLA bargaining process as leverage in its attempt to force P&LE to sell its rail assets to RLEA and its members.

It was just this type of economic coercion and illegitimate use of the bargaining rights granted by Congress that this Court

criticized in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). In *First National Maintenance*, it was feared that forcing management to bargain with unions over decisions involving the exercise of management prerogative, such as the decision to go partially out of business, would give the unions a "powerful tool for achieving delay, a power that might be used to thwart management's intention in a manner unrelated to any feasible solution the union might propose." *Id.* at 683. That fear has been realized in the present case as P&LE has been forced to suffer continuing financial losses while RLEA delays meaningful RLA bargaining and simultaneously furthers its own private agenda. Such an agenda is completely unrelated to any legitimate role labor unions should play in managerial decisions of this nature. RLEA is not seeking through RLA negotiations a solution for P&LE's plight; instead it is using its court-granted leverage to coerce P&LE and its creditors to sell the railroad assets on terms it dictates.

While P&LE is still attempting to sell its assets, as a practical matter no sale can be completed unless RLEA agrees to it. Over the past year, despite P&LE's enormously expensive efforts, RLEA and its members have frustrated all potential sales. Should this Court decide not to grant review based solely on RLEA's self-serving assertion that a settlement "might" occur, it would allow RLEA to continue its tactics of delay and drive P&LE closer to either a forced sale to RLEA or complete abandonment and liquidation. Based on RLEA's tactics in both negotiations and this litigation which have to date thwarted all of P&LE's efforts to sell its railroad, RLEA's latest claim of possible mootness should be viewed as a transparent attempt to evade review by this Court.

Finally, P&LE notes that with the sole exception of RLEA, all who have voiced an opinion on whether this Court should review *P&LE I* and *II* now agree that it is the best vehicle for addressing

the vital issues facing the rail industry.<sup>4</sup> P&LE can only conclude that RLEA's disingenuous dissent from that consensus must be due either to its fear of an unfavorable disposition of the matter by this Court or its misguided desire to pervert the RLA process ordered by the Third Circuit into a forced fire sale of P&LE.

### CONCLUSION

For the reasons set forth herein and in its previous petitions for a writ of certiorari, P&LE respectfully urges that this Court grant the petitions for certiorari in No. 87-1589 and No. 87-1888.

Respectfully submitted,

G. EDWARD YURCON  
(Counsel for Petitioner)  
The Pittsburgh & Lake Erie  
Railroad Company  
780 Commerce Court  
Four Station Square  
Pittsburgh, Pennsylvania 15219  
(412) 263-3806

RICHARD L. WYATT, JR.  
(Counsel of Record)  
RONALD M. JOHNSON  
(Counsel for Petitioner)  
AKIN, GUMP, STRAUSS, HAUSER  
& FELD  
1333 New Hampshire Avenue, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 887-4000

Dated: November 22, 1988

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<sup>4</sup> See, e.g., Brief for National Railway Labor Conference as *Amicus Curiae* at 19; Brief for United States as *Amicus Curiae* at 6, 19; Memorandum of the Interstate Commerce Commission at 4-5.

**APPENDIX A**

May 23, 1988

Joseph F. Spaniol, Jr.  
Clerk  
Supreme Court of the United States  
One First Street, N.E.  
Room G-22  
Washington, D.C. 20543

Re: The Pittsburgh & Lake Erie Railroad Company  
v. Railway Labor Executives' Association,  
No. 87-1589

Dear Mr. Spaniol:

I write on behalf of The Pittsburgh & Lake Erie Railroad Company ("P&LE"), Petitioner in the above-entitled action, to oppose the Railway Labor Executives' Association's ("RLEA") second request for an extension of time for filing its opposition to P&LE's first petition for a writ of certiorari (No. 87-1589). If RLEA's request for an extension of time to and including May 31, 1988 has already been granted, P&LE hereby requests that it be submitted to the Court pursuant to Supreme Court Rule 29.4 and the extension withdrawn.

RLEA's request for an extension of time is an underhanded attempt to ensure that the Court will not be able to act on P&LE's petition before the summer recess and ultimately that P&LE will not be able to gain the Court's review of this case before P&LE is

forced into liquidation and abandonment. Moreover, this latest request for an extension of time is part of a larger RLEA plot to exploit P&LE's need to gain prompt review of this case. RLEA is involved in a joint venture with CSX Transportation whereby the two are negotiating for the purchase of P&LE's rail lines.

Apparently RLEA hopes that its dilatory actions will eventually push P&LE so close to liquidation and abandonment that P&LE will be forced to sell its rail lines at a discount to RLEA or to a buyer approved by RLEA.

RLEA has engaged in a pattern of dilatory actions whenever delay suited RLEA's litigation strategy. RLEA has fully supported expeditious handling of this case when it suited RLEA's purpose, but has repeatedly argued for extensions of time based on counsel's busy litigation schedule, when delay would be to RLEA's advantage. When the district court on October 8, 1987, enjoined RLEA's strike of the P&LE, RLEA filed an emergency appeal seeking, and receiving, summary reversal. RLEA fully complied with a briefing schedule that permitted the Third Circuit to hear oral argument on the district court's October 8 order on October 21, 1987. But when P&LE sought the same expedited treatment for its appeal of the second district court decision in this case (decided November 23, 1987), RLEA failed to comply with the Third Circuit's briefing schedule, causing the Third Circuit to postpone oral argument on that appeal to January 8, 1988. (See Exhibit A, excerpt of transcript of oral argument.)

Now that P&LE is once again seeking prompt review of an adverse ruling, RLEA is again seeking delay based on counsel's busy litigation schedule.<sup>1</sup> RLEA's true motive for seeking further time for filing its opposition (i.e., delay designed to ensure that P&LE will be unable to gain this Court's review before being forced into liquidation and abandonment) is revealed by the information that RLEA chose not to include in its requests for extension of time. Counsel for RLEA contacted counsel for P&LE regarding its first request for an extension of time for filing its opposition and was informed that P&LE would oppose any such request due to its need to gain this Court's prompt review. RLEA then filed its first request with the Clerk's Office on a Friday afternoon without first informing counsel for P&LE of the filing (the filing was sent to counsel for P&LE by regular mail) and without informing the Clerk of P&LE's opposition to this extension of time. By the time counsel for P&LE learned of the filing, the extension had already been granted. RLEA's second extension of time was likewise filed on a Friday afternoon, this time without any prior consultation with counsel for P&LE. RLEA failed to note in this second request that P&LE had, three days previously, filed a Motion for Expedited Consideration of this and its subsequent petition for certiorari in this case (No. 87-1888) (attached as Exhibit B), seeking expedited treatment of these petitions based on P&LE's

---

<sup>1</sup> While P&LE sought and obtained a sixty-day extension of time for filing its first petition for certiorari, it is not inconsistent or unfair that P&LE now opposes RLEA's second request for an extension of time for filing its opposition to that petition. P&LE's extensions of time for filing its first petition were sought for the sake of judicial economy and expedition. P&LE had hoped that the Third Circuit would issue its decision in the second emergency appeal in this case prior to the deadline for filing the first petition, so that P&LE could have sought review (if even necessary) of both decisions simultaneously.

Clerk, United States Supreme Court  
May 23, 1988  
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inability to continue in operation, if judicial review is not soon granted.<sup>2</sup> Counsel for RLEA failed to note the pendency of this Motion for Expedited Consideration in its request for extension of time despite the obvious impact that an extension of time would have on P&LE's ability to gain review of its petition for certiorari before the summer recess.

Given P&LE's need for expedition (as is fully explained in P&LE's Motion for Expedited Consideration and the accompanying affidavit, see Exhibit B), given the ample time allotted to RLEA to respond to P&LE's petition (60 days thus far), and given RLEA's transparent attempt to use this unnecessary delay as a strategy to

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<sup>2</sup> John O'B. Clarke, counsel for RLEA has been well aware of P&LE's plans to seek expedited handling of its petitions. A copy of P&LE's Motion for Expedited Consideration was hand-delivered to Mr. Clarke's office on May 17, 1988, three days before Mr. Clarke presented RLEA's latest request for an extension of time. Moreover, on April 27, 1988, P&LE filed a Supplemental Brief to its first petition (No. 87-1589), noting that it planned to file a Motion for Expedited Consideration along with its second petition. (See Exhibit C.) Additionally, on April 28, 1988, counsel for P&LE contacted Mr. Clarke and informed him that P&LE intended to file its second petition and Motion for Expedited Consideration around May 10, 1988, and planned to seek review of both petitions before the summer recess. Finally, on Saturday, May 21, 1988, upon learning of RLEA's latest request for an extension of time, counsel for P&LE telephoned Mr. Clarke's office. Although Mr. Clarke was not in and was not expected in, counsel for P&LE left a message with Don Griffin of that office informing Mr. Clarke that P&LE would oppose his request for an extension of time.

Clerk, United States Supreme Court  
May 23, 1988  
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enhance its bargaining and litigation position, RLEA's request for an extension of time should be denied.

Respectfully submitted,

/s/ Richard L. Wyatt, Jr.  
Akin, Gump, Strauss, Hauer & Feld  
1333 New Hampshire Avenue, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 887-4000

Attachments

cc: John O'B Clarke, Jr.  
Highsaw & Mahoney  
1050 17th Street, N.W.  
Suite 210  
Washington, D.C. 20036  
(hand delivery)

**APPENDIX B**

October 3, 1988

CSX Transportation, Inc.  
500 Water Street  
Jacksonville, FL 32202

Attention: Mr. Paul R. Goodwin  
Senior Vice President

Gentlemen:

On July 29, 1988, The Pittsburgh & Lake Erie Railroad Company and CSX Transportation, Inc. entered into a letter of intent concerning the proposed purchase of certain of the assets of P&LE by a new entity to be created by Rail Labor Executives' Association with financing to be provided by CSX. It is our understanding that you have previously advised RLEA that, due to its failure to obtain required consents from P&LE's unions to the proposed transaction, you were withdrawing your offer of financial assistance. We also previously advised Brian Freeman, the financial advisor to RLEA, that if certain conditions were not satisfied by August 31, 1988, the P&LE would terminate the transaction described in the letter of intent.

Notwithstanding the fact that CSX had previously withdrawn its offer of financial support and that the deadlines imposed by P&LE had expired, we continued to have discussions with RLEA and with certain of the P&LE unions in an effort to obtain the various consents required to enable us to proceed with

Mr. Paul R. Goodwin  
Page - 2 -

this transaction. While it had initially appeared that agreement could be reached, we have not received a communication from the Transport Workers Union advising us that the most recent proposal has been rejected by the RLEA Task Force. We have, therefore, concluded that it would be unproductive to continue discussions with RLEA concerning the transaction contemplated by the letter of intent. Accordingly, and pursuant to the provisions of Paragraph L of the letter of intent, we are herewith notifying you that the letter of intent is terminated.

We appreciate the time and cooperation of your people over the past several months in working with us toward consummation of the transaction embodied by the letter of intent and we regret that the parties have not received the required cooperation and approval from rail labor. While the letter of intent has been terminated, we anticipate working with you to consider whether some other transaction might be available which would be in the best interests of P&LE and CSX.

Very truly yours,

/s/ Gordon E. Neuenschwander

bcc: C.R. Holley  
G.E. Yurcon  
D.F. Heckathorne

R.W. Kleinman

September 8, 1988

Mr. Brian M. Freeman  
Lowenstein Sandler  
65 Livingston Avenue  
Rosalind, NJ 07068

Mr. K. C. Morriss  
c/o P&LE  
Commerce Ct  
4 Station Square  
Pittsburgh, PA 15219

Dear Brian and Ken,

I received the copies of agreements in principal signed by most of the P&LE general chairmen. Although Brian expressed the hope that he could secure the remaining agreements and resolve the contingencies or qualifications involved, it appears that there are a number of remaining issues being questioned in Newco's proposed agreements, the severance formula is still undetermined and any early timetable for securing ratification by all the unions will not be accomplished.

With the September 1st date now passed and the prospects for concluding agreements still uncertain, CSX Transportation is hereby withdrawing its offer of financial support for the new company proposed to operate the P&LE's business.

Mr. Brian M. Freeman  
Mr. K.C. Morriss  
Page - 2 -

So there will be no misinterpretation of our further involvement with P&LE, you should know that we intend to meet with them on September 16th to propose a competing alternative offer to secure the assets we feel are important to CSX Transportation as they liquidate.

We regret that our venture was not concluded successfully, but feel that further delay reduces the already modest chances of a successful enterprise.

Sincerely,

/s/ Paul

**APPENDIX C**

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD	)	
COMPANY,	)	
	)	<u>Petitioner,</u>
	)	
v.	)	Nos. 87-1589
	)	& 87-1888
	)	
RAILWAY LABOR EXECUTIVES' ASSOCIATION,	)	
INTERSTATE COMMERCE COMMISSION,	)	
	)	
	)	<u>Respondents.</u>
	)	

---

DECLARATION OF GORDON E. NEUENSCHWANDER

I, GORDON E. NEUENSCHWANDER, do hereby  
declare as follows:

1. I am the President and Chief Executive Officer of The  
Pittsburgh and Lake Erie Railroad Company ("P&LE") and have  
been at all relevant times.

2. Since the Order of the United States District Court  
Judge Bloch and its affirmance by the United States Court of  
Appeals for the Third Circuit in RLEA v. Pittsburgh & Lake Erie  
Company, 845 F.2d 420 (3rd Cir.) petitions for cert. pending, Nos.  
87-1888 and 88-217 (1988), P&LE has continued to seek a buyer  
for all of its railroad assets.

3. The original attempt by P&LE to sell its railroad lines  
was a sale transaction between P&LE and P&LE Railco, Inc.

("Railco") which was terminated shortly after the Third Circuit's opinion was issued because the parties were unwilling to await the outcome of protracted court-ordered Railway Labor Act ("RLA") negotiations with P&LE's 14 unions. Moreover, Railco was unwilling to accept all of the existing collective bargaining contracts, unions, and employees, as a condition of the purchase of the assets of P&LE.

4. Thereafter, several other potential purchasers expressed an interest in buying all or part of P&LE's railroad assets. However, as a result of the Third Circuit decision, P&LE had, as a practical matter, to obtain the approval of its unions as a precondition to any new sale proposal. Otherwise P&LE's unions could simply stop any sale through insistence that the purchaser assume all of P&LE's existing employees, unions, and labor contracts, or absent such agreement, strike, as they did to stop the sale to Railco.

5. The second transaction presented to P&LE was an RLEA-sponsored proposal to be financed by CSX Transportation, Inc. ("CSXT"). CSXT is a large railroad whose employees are also represented by some of the unions which represent P&LE's employees. Under the RLEA-CSXT proposal, an employee-owned company to be called Newco would have acquired the assets of P&LE, which would have thereafter been operated as a new carrier after obtaining I.C.C. approval. Ironically, this union-sponsored proposal called for essentially the same reductions in the number of jobs and types of work rule changes as in the original sale proposal with Railco, which triggered the union opposition to that sale. Negotiations were conducted between CSXT and P&LE on the one hand, and RLEA and Newco on the other. RLEA was represented in those negotiations by Mr. Brian M. Freeman, an investment advisor for the Railway Labor Executives' Association.

6. After the Third Circuit's decision, P&LE also undertook bargaining over the effects of any sale on its employees. During the course of the purchase negotiations between RLEA and Newco, RLEA essentially requested that P&LE forego Railway Labor Act ("RLA") effects bargaining as required by the Third

Circuit. While P&LE was reluctant, it did so because the RLEA assured P&LE that it was entering the sale negotiations in good faith and that RLEA and its members would do everything possible to achieve an expeditious settlement and sale of P&LE's assets to an employee-owned purchaser, Newco.

7. Over the summer of 1988, CSXT and P&LE negotiated and executed a Letter of Intent for the sale of P&LE's assets. This letter contained several conditions, including a condition that P&LE's unions agree to the sale. Newco and RLEA, however, were never able to reach an agreement supported by all of P&LE's unions. After at least one of P&LE's unions indicated it opposed the RLEA-Newco proposal, P&LE and CSXT terminated the Letter of Intent, and CSXT withdrew from its participation in the proposed joint venture with RLEA.

8. P&LE has now asked the National Mediation Board to resume the court-ordered RLA effects negotiations. P&LE has received no assurance from RLEA or the rail unions it represents that these negotiations will be concluded expeditiously. In my opinion, the likelihood of negotiating an effects agreement with RLEA and P&LE's unions is highly uncertain.

I declare under penalty of perjury that the foregoing is accurate to the best of my knowledge and belief.

/s/ Gordon E. Neuenschwander

(10) (13)  
Nos. 87-1589 & 87-1888

Supreme Court, D.C.

FILED

DEC 6 1988

JOSEPH R. SPANGLER, JR.  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
INTERSTATE COMMERCE COMMISSION,  
*Respondents.*

**On Petitions For Writs Of Certiorari To The  
United States Court of Appeals  
For The Third Circuit**

**APPENDIX TO PETITIONER'S SUPPLEMENTAL BRIEF**

G. Edward Yurcon  
THE PITTSBURGH & LAKE ERIE  
RAILROAD COMPANY  
780 Commerce Court  
Four Station Square  
Pittsburgh, Pennsylvania 15219  
(412) 263-3806  
*(Counsel for Petitioner)*

Richard L. Wyatt, Jr.  
*(Counsel of Record)*  
Ronald M. Johnson  
AKIN, GUMP, STRAUSS, HAUER  
& FELD  
1333 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
(202) 887-4000

December 6, 1988

November 18, 1988

VIA TELECOPY

Brian Freeman  
Brian M. Freeman & Co.  
65 Livingston Avenue  
Rosalind, New Jersey 07068

Dear Brian:

Pursuant to our telephone conversation today, enclosed is the draft Term Sheet.

Please call me if you have any questions on the enclosed. I can be reached over the weekend at home at (312) 664-8289 and in the office on Monday morning.

Very truly yours,

/s/ Susan G. Lichtenfeld

SGL:shp

enclosure

cc: Gordon E. Neuenschwander  
G. Edward Yurcon  
Donald F. Heckathorne  
Robert W. Kleinman

SGL-3-cl DRAFT: FOR DISCUSSION PURPOSES ONLY

TERM SHEET

- Payment to each of PLE's presently working or furloughed employees who will not be employed by the P&LE under new labor agreements:

80% of such employee's annualized total compensation, but not more than \$25,000 per employee.

- Annualized total compensation per employee will be determined by calculating the average monthly total compensation for such employee for the period August 1, 1987 through October 31, 1988 and by multiplying such average monthly compensation by 12.
- Full payment of unused 1989 vacation due such employee to the extent earned in 1988.
- Sign-On Payment of \$3,000 to each of PLE's presently working employees who accept employment with the PLE under new labor agreements.
- The operations of the PLE will be performed by between 220-230 union employees.
- Conditions to Closing:

- (1) Written consent of the P&LE's Creditors.
- (2) Ratification and approval by the General Chairman of the P&LE's unions.
- (3) Negotiation and execution of operating agreements between the P&LE and its unions, on terms satisfactory to the P&LE and containing terms and provisions generally comparable to the agreements proposed to be used by the joint venture between RLEA and CSXT. Such agreements would contain the following additional provisions:
  - provisions relating to P&LE's responsibility to any employee losing employment with the P&LE due to any line sale, in whole or in part, by the P&LE within the 24 month period following the Cut-Off Date (as hereinafter defined) and who is not offered comparable employment by the acquiring entity, including provision for payment of a separation allowance to be paid by P&LE to a terminated employee at the Cut-Off Date.
  - moratorium on the filing of Section 6 notices for a period of 24 months following the Cut-Off Date.
  - no strike clause.
  - wages at 85% of present levels, with appropriate adjustment where applicable to recognize the elimination of arbitraries and similar items.

(4) Waiver by each employee accepting the severance or sign-on payment of any and all claims it has or could have against the P&LE under existing labor agreements, which will be deemed to have been terminated effective upon his ratification of new labor agreements.

- The Cut-Off Date will be deemed to be the date the PLE determined that a sufficient number of unions and union members have ratified new agreements to enable the PLE to accomplish efficient operations. Severance and sign on payments will be made on the Cut-Off Date, which in no event shall occur later than January 31, 1989.
- To the extent this agreement is not accepted by any of the General Chairmen or any union members by the Cut-Off Date, PLE may subsequently agree to make severance payments to such employees, but any such payments would be subject to offset equal to the amount of the total compensation paid by the P&LE to such persons after the Cut-Off Date.
- Initial written acceptance by the General Chairman of the terms stated herein, received by the P&LE no later than December 5, 1988.

(11) (14)  
No. 87-1589 and 87-1888

Supreme Court, U.S.  
FILED  
JAN 18 1989  
JOSEPH F. SPANIOLO, JR.  
CLERK

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**In the Supreme Court of the United States**  
OCTOBER TERM, 1988

---

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,  
PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

---

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,  
PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION AND  
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

---

*ON WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

---

**BRIEF FOR THE INTERSTATE COMMERCE COMMISSION**

---

ROBERT S. BURK  
*General Counsel*

HENRI F. RUSH  
*Deputy General Counsel*

JOHN J. MCCARTHY, JR.  
*Deputy Associate General Counsel*

CLYDE J. HART, JR.  
*Attorney*

**INTERSTATE COMMERCE  
COMMISSION**

12th Street & Constitution Ave., N.W.  
Washington, D.C. 20423  
(202) 275-7009

---

44-1912

#### QUESTION PRESENTED

Whether the majority of the court below was correct in concluding that it was compelled to hold that the Interstate Commerce Act (ICA) does not supersede the Railway Labor Act (RLA) and the Norris LaGuardia Act (NLGA) when necessary to permit consummation of a Commission authorized transaction, which followed a judicially approved process in which rail labor participated, notwithstanding the court's acknowledgement that the effect of its holding is the frustration of a Congressionally designed program to promote continued rail service.

## PARTIES TO THE PROCEEDINGS

The petitioner in Nos. 87-1589 and 87-1888 is the Pittsburgh & Lake Erie Railroad Company. The respondent in 87-1589 is the Railway Labor Executives' Association. The respondents in 87-1888 are the Railway Labor Executives' Association and the Interstate Commerce Commission.

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1589

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,  
PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

No. 87-1888

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,  
PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION AND  
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

ON WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

## OPINIONS BELOW

The opinions of the court of appeals are reported at 831 F.2d 1231 (Pet. App. (No. 87-1589) 1a-13a)<sup>1</sup> and at 845 F.2d 430 (Pet. App. (No. 87-1888) 1a-70a). The opinions of the Interstate Commerce Commission (Pet. App. (No. 87-1888) 96a-104a, 105a-108a) are unreported.

<sup>1</sup> "Pet. App." refers to the appendices to the petitions for writs of certiorari in Nos. 87-1589 and 87-1888.

### JURISDICTION

The judgments of the court of appeals (Pet. App. (No. 87-1589)1a) and (Pet. App. (No. 87-1888)1a) were entered on October 26, 1987, and April 8, 1988. The petitions for writs of certiorari were filed on March 24, 1988 and May 17, 1988 and granted on November 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See 28 U.S.C. 2350(a).

### STATUTES INVOLVED

Relevant provisions of the Interstate Commerce Act, 49 U.S.C. 10505, 10901 and the Railway Labor Act, 45 U.S.C. 156, are set out Pet. App. (No. 87-1888) 86a-91a. Pertinent provisions of the Norris-LaGuardia Act, 29 U.S.C. 104 are set out at Pet. App. (No. 87-1589) C1-C2.

### STATEMENT

The Interstate Commerce Commission (Commission) has plenary authority to examine, condition, and approve proposed rail carrier sales, abandonments and consolidations. Under Section 10901 of the Interstate Commerce Act (ICA), 49 U.S.C. 10901, a non-carrier can acquire and operate a railroad line "only if the Commission finds that the public convenience and necessity require or permit" that it be done.

Under Section 10505 of the ICA, the Commission has the power to exempt rail transportation from the requirements of the Act. In fact, the Commission "shall exempt" rail transportation "when the Commission finds that the application of a provision of this subtitle. . . "is not necessary to carry out the transportation policy of Section 10101a." 49 U.S.C. 10505(a)(1). Among other things, however, the exemption "does not relieve a carrier of its

obligation to protect the interests of employees" insofar as such protection is afforded by the ICC under 10901 or other provisions of the ICA. 49 U.S.C. 10505(g)(2). The Commission retains its authority over the exempt transaction and may revoke the exemption to the extent the Commission finds necessary to carry out the transportation policy embodied in the ICA. 49 U.S.C. 10505(d).

### REGULATORY FRAMEWORK

In the years just after the partial deregulation of the railroad industry occasioned by the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1941-45, numerous new short lines and regional rail lines were created, pursuant to 49 U.S.C. 10901, through the sale of marginally profitable and unprofitable rail lines to new entities eager to provide rail service. In considering and approving these sales, the Commission became convinced that the expense imposed on such sales by the imposition of labor protective conditions was hampering the development of short line railroads and, indeed, was forcing the selling carriers to abandon these marginal lines pursuant to 49 U.S.C. 10903 of the ICA.

In order to foster the development of short line railroads to preserve rail facilities, service and employment that would otherwise be lost through abandonments, the Commission began withholding labor protections in individual sales.<sup>2</sup> After considering over five years many

<sup>2</sup> The imposition of labor protections in short line sales to new entrants is within the Commission's discretion. The Commission's theory on withholding protection was grounded on the premises that preservation of continued rail service through line sales to new entrants (1) is beneficial to shippers and the communities served, (2) offers the best opportunity for rail labor's employment, and (3) this process is preferable to the process of abandonment and sale of the marginal line under 49 U.S.C. 10903 and 10905. See, *Knox and Kane Railroad*

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such applications, the Commission determined that formation of new rail carriers should be encouraged. In order to aid rail formations, the Commission promulgated the procedures in Ex Parte No. 392 (Sub-No.1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985) aff'd sub nom. *Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (mem.) ("Ex Parte 392"). In Ex Parte 392 the Commission exempted rail line sales to new carriers from full compliance with Commission procedures while retaining authority, under its revocation power, to review the transaction and correct any problem arising out of the transaction.

Ex Parte 392 establishes a scheme by which an entity or a carrier can apply for an exemption which will be granted seven days after filing, unless the Commission notifies the parties to the contrary. See 49 C.F.R. 1150.<sup>3</sup> Any opposition to the exemption could be lodged via a petition to revoke the exemption filed with the Commission at any time. Commission consideration of the petition to revoke could result in partial revocation of the exemption, imposition of labor protective conditions or cancellation of the transaction through the termination of the entire ex-

*Co.-Gettysburg Railroad-Petition for Exemption*, 366 I.C.C. 439 (1982).

A history of the development of line sales to new carriers, its causes and consequences, and the Commission's view of its authority to preempt other statutes may be found in the Commission decision, Finance Docket No. 31205, *FRVR Corporation-Exemption Acquisition and Operation-Certain Lines of C&NW Transportation Company-Petition for Clarification* (January 29, 1988); petition for review denied, sub. nom. *RLEA v. ICC*, 861 F.2d 1082 (8th Cir. 1988); petition for rehearing pending. (Pet. App. 109a-129a).

<sup>3</sup> On February 29, 1988, the Commission modified the Ex Parte 392 procedures to extend the notice period and delay the effective date of the exemptions involving line sale transactions that result in the creation of larger railroads. 53 Fed. Reg. 5,081.

emption. The Commission's order disposing of the petition is reviewable in the courts of appeals. 28 U.S.C. 2342.

Ex Parte 392 was formulated with the participation of RLEA and in the face of an RLEA demand that the Commission impose labor protections on all 10901 sale transactions. 1 I.C.C. 2d at 813-815. The Commission rejected this demand in favor of the imposition of labor protections in individual transactions upon a showing of exceptional circumstances justifying such imposition. 1 I.C.C. 2d at 815. Thereafter RLEA sought review of Ex Parte 392 in the court of appeals. This petition was denied. See *Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (mem.).

#### The Present Dispute

This case arose when the Pittsburgh & Lake Erie Railroad Company ("P&LE"), a railroad with 182 miles of track, decided to sell its entire railroad business. (Pet. App. (No. 87-1888)9a). After years of heavy financial losses, P&LE reached agreement with P&LE Railco, Inc. ("Railco") for the latter to buy and operate the line, albeit with a reduced number of employees. On September 19, 1987, Railco filed a Notice of Exemption with the Commission pursuant to Ex Parte 392. (Pet. App. (No. 87-1888)96a). RLEA requested the Commission to reject the notice and a related filing by Railco's parent, Chicago West Pullman Transportation Company ("CWPT"). (Pet. App. (No. 87-1888)98a). RLEA also filed with the Commission a "Complaint for Cease and Desist Orders and Other Relief." (*Id.*). In sum, these filings were aimed at obtaining a determination that the Commission could only approve the sale under 49 U.S.C. 11343 which requires the imposition of labor protections on all parties to the transaction. (Pet. App.(No. 87-1888)98a).

The Commission refused to stay or reject the exemption notices which became effective September 26, 1987. In its

order served September 29, 1987 in Finance Docket Nos. 31121, 31122 and 31126, *P&LE Railco, Inc. — Exemption Acquisition and Operation — Lines of the Pittsburgh and Lake Erie R. Co. and The Youngstown and Southern Ry Co.* (Pet. App. (No. 87-1888) 96a-104a), the Commission found that RLEA was not likely to succeed on the merits and had failed to show it would suffer irreparable harm in the absence of a stay. Moreover, the Commission found that any stay would harm the operations of P&LE, given the carrier's precarious financial position and the uncertainty surrounding the carrier's labor situation. *Id.*<sup>4</sup> RLEA then asked the Commission to reconsider and stay consummation of the sale. (Pet.App. (No. 87-1888) 105a-107a). RLEA did not, and has not, asked the Commission to impose labor protective conditions on the sale. The Commission denied the petition for reconsideration but required P&LE to retain its corporate existence until after the Commission completed review of any petition to revoke the exemption filed within 30 days of its decision. (Pet. App. (No. 87-1888) 101a).

Thereafter RLEA filed a petition to revoke the exemption granted by the Commission. (Pet. App. (No. 87-1888)106a). In this document RLEA argued that P&LE was insolvent and that, as an alternative to the sale to Railco, the Commission should require the purchase of P&LE's assets by its employees. The petition to revoke is pending before the Commission.<sup>5</sup>

<sup>4</sup> On September 15, 1987 P&LE was struck by its unions.

<sup>5</sup> On November 3, 1988 RLEA filed with the Commission a petition styled as: Motion for Dismissal of Petitions upon Suggestion of Mootness. There RLEA contends that the sales agreement between P&LE and CWPT has no further force or effect. In RLEA's view the petitions to revoke the exemption are moot as the sale will not take place. RLEA also claims that the Commission should vacate the ex-

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RLEA also filed with the district court below (United States District Court for the Western District of Pennsylvania) a complaint requesting an injunction against the sale until P&LE exhausted the procedures of the Railway Labor Act (RLA), relating to collective bargaining over the carrier's decision to sell and the effects of the sale on the employees. P&LE defended on the ground that the sale is within the exclusive and plenary jurisdiction of the ICA and that ICC authorization of the transaction rendered resort to RLA procedures unnecessary. On October 8, 1987, the district court enjoined the strike that had crippled P&LE since early September. The court held that the strike was intended to negate the Commission's determination that employee protections should not be required in 10901 transactions; that the ICA relieved P&LE of any duty to bargain under the RLA; and that Section 4 of the NLGA must be accommodated to the purposes of the ICA and to the jurisdiction of the Commission to determine what employee protections should be required in 10901 transactions. (Pet. App. (No. 87-1888)14a).

On October 26, 1987, after an expedited briefing schedule and hearing, in which the Commission was granted leave by the court to participate as an *amicus*, a Third Circuit panel summarily reversed the District court on the issue of whether the court below had jurisdiction to enter an injunction against the strike. In the Third Circuit's view the ICA is not a labor statute and thus not a statute "to which the Norris-LaGuardia Act must be accommodated." 831 F.2d at 1240. The court, in a decision now popularly referred to as "*P&LE I*", remanded the case to the District Court. (Pet. App. (No. 87-1589)98a). The Petition for Writ of Certiorari in No. 87-1589 followed.

emptions obtained by Railco pursuant to the "Munsingwear Doctrine," *United States v. Munsingwear Inc.*, 340 U.S. 34, 39 (1950). This motion is pending before the Commission. Respondent believes this matter is not moot for reasons set forth in our reply memorandum in No. 88-217 and the Solicitor General's *amicus* memorandum in these proceedings.

On remand the district court rejected the arguments that the ICA granted exclusive jurisdiction over rail carrier transactions authorized by the Commission and that the Commission's exclusive jurisdiction superceded the carrier's duty under the RLA to bargain over the sale and the effects of the sale. The court enjoined the sale until the carrier exhausted the bargaining procedures of the RLA to change existing collective bargaining agreements or the purchaser agreed to adopt them. (Pet. App. (No. 87-1888) 71a-85a).

P&LE, joined by the Commission as Intervenor, appealed this judgment to the Third Circuit. On April 8, 1988, that court rendered the decision popularly known as "*P&LE II*", 845 F.2d 420. A divided court of appeals felt "constrained" to hold the RLA dispute resolution procedures applicable to the sale of P&LE (Pet. App. (No. 87-1888) 5a and 57a) even though the result would frustrate the mandate of the ICA. *Id.* 6a. In reaching this conclusion the panel majority acknowledged that imposing the RLA requirements in this situation "may ultimately have the perverse effect of destroying the only chance P&LE has for survival . . ." (Pet. App. 57a)<sup>6</sup> and of frustrating a congressional program designed to promote continued rail service (Pet. App. 33a-35a).

The court first considered the issue of the character of the dispute between the parties. The panel found the dispute to be a major dispute under the RLA. The sale of the rail line accompanied by a "substantial reduction" of jobs entails, in the court's view, a "change in agreements affecting rates of pay, rules or working conditions" (Pet. App. 16a-18a) and signals, therefore, a major dispute that

<sup>6</sup> Since the granting of the status quo injunction in this case the number of entrants seeking exemption under the Ex Parte 392 procedures has decreased by approximately 50%. The mileage sought to be transferred has decreased by 85%. The mileage sought to be abandoned by rail carriers has increased for the first time since 1982. See footnote 11, *infra*.

normally triggers the RLA's status quo provisions unless "overridden by the ICA."

The panel majority construed its duty to "read the two statutes in harmony . . . for it is clear that repeals by implication are heavily disfavored" (citation omitted) (Pet. App. 44a-45a). With that in mind the majority shouldered aside the ICA in favor of the RLA. (Pet. App. 45a).

The majority rejected all the arguments advanced in favor of the ICA's supersession of the RLA. First, the majority found no explicit authority in the ICA to support its supersession of the RLA. (Pet. App. 37a). Second, it held that the relief sought by RLEA was not a collateral attack on the *Ex Parte* 392 decision. It grounded this conclusion on its reading of the Commission's order granting the exemption as being "permissive" and not "mandatory" (Pet. App. 37a), on the conclusion that the district court's order did not impose any protection for labor but only required bargaining, and, finally, on its view that the district court's order did not block the sale but only delayed it and does not grant rail labor a veto over the sale. (Pet. App. 43a)

The majority advanced three reasons in support of its holding against ICA supersession of the RLA in rail transactions authorized by the Commission. First, it found "significant" the fact that, while the Commission unquestionably has the role of overseer of rail transportation, Congress did not amend the RLA's bargaining process to specifically declare that the RLA had no role in 10901 sales. (Pet. App. 33a). Second, the majority found it "unlikely" that Congress intended that rail labor look only to the Commission as its sole source of protection because the "interests of labor are . . . only a relatively small concern of the ICC", leaving the RLA intact as the mechanism for labor to assert its own interests. (Pet. App. 48a)<sup>6</sup>

<sup>6</sup> In support of this conclusion the Third Circuit listed fifteen policies the Commission is required to take into account in any rail

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Third, the majority opined that supersession of the RLA by the ICA may not be necessary. In their view, the provisions of the ICA that would relieve the carrier of its obligation under the RLA (Pet. App. 56a) did not present an "irreconcilable conflict" with the RLA (Pet. App. 56a). In summation, while conceding that the "trend in the case law has been to diminish the delaying effect of the RLA in cases where the Commission has approved the expeditious consummation of a transaction" (Pet. App. 53a), the majority held itself powerless in the face of the RLA and "constrained" to enjoin the sale until the RLA procedures had been complied with by the carrier, (Pet. App. 61a).

Judge Hutchinson dissented (Pet. App. 61a-69a) on the ground that the majority's result contravened the Staggers Act. In his view the ICA and the RLA are "inherently contradictory" and Congress intended the ICA to prevail. (Pet. App. 61a). The dissent noted that the Commission is required to balance the needs of all interests in the rail industry in order to maintain the national rail system, and that the status quo requirement of the RLA "contradicts the ICC's approval of the sale of P&LE . . . and makes that approval obsolete". (Pet. App. 62a). Further, in Judge Hutchinson's view, when Congress, in enacting the Staggers Act, *supra*, and the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 128 ("4R" Act), left the Commission's labor policies "largely untouched", even in the face of rail labor's strong efforts to change these policies, it signified Congress's agreement with Commission actions in not providing mandatory labor protections and with the Commission's role

transaction. See, 49 USC 10101a. It found that only one policy "directs the attention of the ICC to the interests of labor" (Pet. App. 47a). Unmentioned in the *P&LE II* decision is the extensive history of ICC jurisdiction over rail labor protection issues. (See, Argument, Section D, *infra*, pgs. 29-35).

as the sole provider of labor protections in rail transactions committed to the Commission's approval process. (Pet. App. 64a, *citing* H.R. Conf. Rep. No. 1012, 99th Cong., 2d Sess. 250, reprinted in 1986 U.S. Code Cong. and Admin. News 3868, 3895; Railroad Transportation Policy Act of 1979; Hearing Before the Committee on Commerce, Science, and Transportation on S. 1946, 96th Cong., 1st Sess. 536, 539 (1979) and *RLEA v. ICC*, 784 F.2d 959, 965 (9th Cir. 1986) (discussing Congress's failure to amend ICA)).

Judge Hutchinson opined that RLEA's suit is a collateral attack on *Ex Parte* 392 because the practical effect of this suit contradicts or countermands a Commission order. (Pet. App. 67a, *citing*, *UTU v. Norfolk and Western Ry. Co.* 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied* 107 S.Ct. 927 (1987); *B.F. Goodrich Co. v. Northwest Industries, Inc.*, 424 F.2d 1349, 1352-54 (3rd Cir.), *cert. denied*, 400 U.S. 822 (1970)). Finally, the dissent chides the majority for allowing RLEA's "artful wording" of its pleading to circumvent the avenue Congress has prescribed to appeal Commission denials of labor protection. (Pet. App. 67a, *citing*, *RLEA v. United States*, 811 F.2d 1327 (9th Cir. 1987)). P&LE filed a petition for a writ of certiorari to review this decision.

#### SUMMARY OF ARGUMENT

A. The Commission believes its right to present its position to this Court on these issues of paramount importance to Commission administration of the line sales program and the Commission's function as overseer of the rail national transportation system is undeniable. This Court's recent decision in *United States v. Providence Journal Co.*, 56 U.S.L.W. 4366, 4370, n.9 (May 2, 1988), far from raising doubts about the Commission's right to litigate in-

dependently before this Court, expressly recognized that right. See, *Providence Journal*, *supra*, fn. 9. Such a right must of necessity extend to defense against collateral attacks upon Commission orders to prevent the Commission's authority from being eroded if not totally debased.

B. The Court below erred in concluding that it must deny effect to the ICA in order to avoid repeal by implication of the RLA. The lower court's approach to reconciliation of the two statutes directly conflicts with this Court's recent decision in *United States v. Fausto*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 668, 676 (1988).

C. The Commission's jurisdiction to authorize rail transactions is exclusive and plenary. This Court has consistently in the past determined the authority of the Commission over the approval of line extensions, consolidations, abandonments and other dispositions of rail property affecting rail transportation to be total. *Transit Commission v. United States*, 289 U.S. 121 (1933); *Schwabacher v. United States*, 334 U.S. 182 (1948); *Chicago & North Western Transportation Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311 (1981) ("*Kalo Brick*"); and *ICC v. Brotherhood of Locomotive Engineers*, \_\_\_ U.S. \_\_\_, 107 S.Ct. 2360 (Stevens opinion) (1987).

The Commission's jurisdiction of necessity extends to the agency's oversight of labor management relations in connection with transactions it has authorized to ensure that the public benefits associated with the Commission authorized transactions will not be frustrated. *United States v. Lowden*, 308 U.S. 225 (1939); *ICC v. Railway Labor Association*, 315 U.S. 373 (1942); and *ICC v. BLE*, *supra*.

The decisions of the Third Circuit conflict with decisions of this Court upholding the Commission's exclusive and plenary authority over consolidations, abandonments, sales, and other dispositions of rail assets in the

rail industry, and with the agency's statutory obligation and authority to resolve labor management disputes arising out of Commission authorization of these transactions. *Norfolk & Western Ry. Co. v. Nemitz*, 404 U.S. 37 (1971); *Missouri Pacific Railroad Company v. UTU*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S.Ct. 3209 (1987) ("*MOPAC*"); *Hayfield Northern R. Co. v. Chicago & North Western Transportation Company*, 467 U.S. 622 (1984); *Burlington Northern Railroad Company v. UTU*, 848 F.2d 856 (8th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3376. (November 28, 1988) ("*BN*").

D. The entire rationale of the decisions of the majority of the panels below for withdrawing the ICA's preemptive effect over labor disputes arising out of Commission authorized transactions is grounded in the false notion that the ICA is not a labor statute.<sup>8</sup> On the contrary the ICA is a labor statute to which the RLA and NLGA must be accommodated.

The history of labor management relations in the rail industry is in large measure the history of the Commission. The Commission's power to impose labor protections where necessary to ensure labor peace has long been recognized by this Court. *Lowden*, *supra*; *ICC v. Railway Labor Association*, *supra*. Moreover, the past decades have seen Congress steadily expand the Commission's role in resolving labor disputes in the rail industry. See, Transportation Act of 1940, 54 Stat. 899; 4R Act, *supra*; Staggers Rail Act of 1980, *supra*. This extensive history refutes the notion that the ICA is not a labor statute. In fact, it is the only rail labor statute in Congress's contemplation for resolving labor disputes which arise out of

<sup>8</sup> The *P&LE II* court's authority for this proposition rests almost exclusively in the Third Circuit's prior *P&LE I* decision. See Pet. App. 50a, citing *RLEA v. P&LE*, 831 F.2d at 1236.

Commission approved transactions and it has enjoyed that status for fifty years.

Finally, a comparison of the dispute resolution procedures in the ICA, particularly those within 49 U.S.C. 10901, and those in the RLA confirms the ICA's status.<sup>9</sup>

Thus, the history of the ICA, Congressional action in amending the ICA, the case law and logic confirm the status of the ICA as a labor statute.

E. As a labor statute, the processes for dispute resolution contained in the ICA and *Ex Parte No. 392 (Sub-No. 1)* are as worthy of protection from strikes that would undermine them as are the comparable provisions of the RLA. In the line of cases known as the "accommodation" cases, courts have had to adjust two labor statutes, such as the RLA and NLGA, to each other. In the leading cases in this area, this Court has allowed the federal courts to enjoin strikes to protect the jurisdiction of the agency charged with resolving the particular labor dispute. *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R.*, 353 U.S. 30 (1957); *Boys Markets, Inc. v. Retail Clerk's Union*, 398 U.S. 235 (1970). In those cases, as in procedures developed under *Ex Parte 392*, the agencies' procedures were designed to channel the dispute into a peaceful resolution of the issue. In the *Ex Parte 392* procedures the Commission offers a comprehensive administrative scheme for the resolution of any dispute arising out of the rail transaction similar to and consistent with the administrative processes protected by the Court in

<sup>9</sup> It is this administrative scheme that the *P&LE I* panel claimed would relegate RLEA "to a small voice of protest" of the transaction. Pet. App. 51a, n.28. To the contrary, rail labor has fully participated in establishing *Ex Parte 392*, the granting of this exemption and may still request the Commission to impose labor protections. Moreover, the Commission's determination with respect to the grant or denial of labor protection is reviewable.

*Boys' Market* and *Chicago River*. Clearly, a union may be enjoined from striking so that the *Ex Parte 392* procedures may be completed.

F. Reconciling the two conflicting statutory regimes in the manner proposed by the majority of the panel below negates the Commission's authority to approve transactions in the public interest by giving rail labor a veto. Adopting the reconciliation proposed by the Commission, on the other hand, permits Commission authorized transactions found to be in the public interest, after balancing all competing interests, to be consummated subject, of course, to review by the courts of the balancing process. Clearly, the latter construction is preferable even if it were up to the courts to construe the statutes in the first instance, which we submit it is not in view of the reasonable construction of the Commission — the agency charged with administering the rail line sales program. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

## ARGUMENT

### A. THE INTERSTATE COMMERCE COMMISSION HAS THE INDEPENDENT LITIGATING AUTHORITY TO DEFEND ITS ORDERS BEFORE THIS COURT

The Solicitor General, by letter dated June 14, 1988, advised the Court that he had determined the Interstate Commerce Commission is not "properly a party respondent" and that he has not authorized the filing of a responsive brief in this case. Similarly, in an amicus memorandum addressed to the Commission's independent petition for writ of certiorari to the Third Circuit in *P&LE II* (No. 88-217), the Solicitor General urged the Court to dismiss the Commission's petition. His position is that Commission intervention in the proceeding below to defend

against collateral attack on the *Ex Parte* 392 procedures and premature judicial intrusion upon a proceeding then pending before the agency was improper even though authorized by the court below. Although the Commission believes that the court's acceptance of the Commission's filings in support of granting the writs in these proceedings and denial, as opposed to dismissal, of the Commission's petition in No. 88-217 is dispositive of this issue, we briefly outline our position herein. For a more complete elaboration of that position, the Court is respectfully referred to the Commission's petition for writ of certiorari and reply to opposition in No. 88-217.

The Interstate Commerce Commission has the authority to independently litigate before this Court and in the lower courts in defense of its orders. The Commission's right to do so has been recognized since at least this Court's decision in *ICC v. Oregon-Washington Rail Co.*, 228 U.S. 14 (1933) and, rather than being called into question by the Court's recent decision in *Providence Journal*, *supra*, fn 9, is vindicated by that decision. This authority extends to the defense against collateral attacks on Commission orders of the character launched by RLEA in this case. *Venner v. Michigan Central Railroad Co.*, 271 U.S. 127 (1925). 28 U.S.C. 2323 grants the Commission the authority to appear on its own motion in any action involving the validity of a Commission order. See, H. Rep. No. 93-1569, 93d Cong., 1st Sess. 9 (1974).<sup>10</sup> The denial of Commission authority to appear in cases collaterally attacking ICC orders would lead almost inevitably to evasion of direct review by parties to Commission proceedings, prevent the Commission defense of its position

<sup>10</sup> See also, Hearing on S. 663, United States Senate Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, 93d Cong., 1st Sess. (1973).

where executive branch policy is contrary to Commission policy, and deprive the Court of the views of a central party in such disputes. Such a result is unacceptable under *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935) and *Morrison v. Olson*, — U.S. —, 108 S.Ct. 2397 (1988) and contrary to the Congressional will as expressed in the debate over changing the process for judicial review of Commission orders. H. Rep. No. 93-1569, *supra*.

**B. THE COURT OF APPEALS MISTAKENLY CONDEMNS THE SUPERSESSION OF THE RLA BY THE ICA AS AN IMPLIED REPEAL OF THE RLA**

The Third Circuit panel's majority considered its duty to be to read the ICA and RLA together in order to prevent what it called the "repeal by implication of the RLA" Pet. App. 6a, citing *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). The law is clear that the RLA has no role to play in ICC approved transactions (See Argument Section C, *infra*). Moreover, this Court has recently held the Third Circuit's formulation of the implied repeal of a statute to be in error. Thus, the court below misperceived its duty and engaged in the wrong analysis to reach its conclusion.

In *United States v. Fausto*, — U.S. —, 108 S.Ct. 668, 676 (1988), the Court confirmed that what it confronts here, as there, is simply "a repeal by implication of a legal disposition implied by a statutory text" and not "a repeal by implication of an express statutory text." (*Id*). The Court found that the former task is frequently done "whenever, in fact, they (Congress) interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted." (*Id*). In such circumstances, what the Court faces is the "classic judicial task of reconciling many-laws enacted over time, and getting them to

“make sense” in combination.” (*Id.*). A task that “necessarily assumes that the implications of a statute may be altered by the implications of a later statute.” (*Id.*). This reconciliation process was essentially followed in *Boys Market v. Clerks’ Union*, *supra*, at 250-251 (1970), where the Court accommodated the NLGA to permit the effectuation of the arbitration procedures of the Labor Management Relations Act. (See, Argument, Section E, *infra*). In the instant case this Court is reviewing the RLA in light of the ICA and its statutory commands. The Commission submits that the implications of the RLA are changed when a Commission approved transaction is present and that this alteration is not an implied repeal of the RLA.

**C. THE INTERSTATE COMMERCE COMMISSION’S APPROVAL OF A RAIL TRANSACTION UNDER SECTION 10901 OF THE INTERSTATE COMMERCE ACT, 49 U.S.C. 10901, EXEMPTS THE PARTICIPANTS FROM PROVISIONS OF ANY STATUTE THAT ACTS AS AN OBSTACLE TO THE IMPLEMENTATION OF THE APPROVED TRANSACTION**

The court of appeals erred in holding that the Commission’s approval of a rail sales transaction under Section 10901 of the ICA is insufficient to exempt a participant from the requirements of other laws where those laws act as obstacles to the transaction. The ruling is inconsistent with the structure and purposes of the ICA’s provisions, longstanding precedent and the Congressional determination to give the Commission the role of overseer of the nation’s rail transportation system. It has seriously impeded the implementation of Commission approved transactions

designed to revitalize the nation’s regional railroad system.<sup>11</sup>

When considering transactions for approval pursuant to the ICA the Commission’s authority over rail transportation is total. The Commission has exclusive and plenary authority over the consolidation, transfer, abandonment and sale of rail lines. *Schwabacher v. United States*, 334 U.S. 182 (1948); *ICC v. Brotherhood of Locomotive Engineers*, *supra*; *Kalo Brick*, *supra*. This jurisdiction extends to the sale or transfer of rail lines and rail properties to non-carrier entities that seek to provide rail transportation. 49 U.S.C. 10501(d) and 10901.

This Court has previously had occasion to review and uphold the exclusive and plenary nature of the Commission’s authority in abandonments, mergers, and consolidations of rail properties. The sole rail line transaction not explicitly ruled on by the Court is that relating to the sale of lines to non-carrier entities, the case now before the Court.

The Commission’s authority has consistently been held by this Court to extend to all matters and disputes which

<sup>11</sup> The *Ex Parte* 392 procedures had been effective. Railroad formation had risen each year since 1982 and the miles of lines abandoned by carriers had fallen each year since that year. However, since the court of appeals decisions the number of entrants seeking exemptions under the *Ex Parte* 392 procedures has decreased by approximately 50% from 1987 to 1988. Moreover, the number of miles sought to be abandoned increased for the first year since 1982 from 1,932 in FY 1987 to 2,996 in FY 1988. See, Finance Docket No. 31205, *FRVR Corporation—Exemption, Acquisition and Operation—Certain Lines of Chicago & North Western Transportation Co. Petition for Clarification*, Served January 29, 1988, *Petition for review denied sub nom., RLEA v. ICC*, 861 F.2d 1082 (8th Cir., 1988); petition for rehearing pending. See also, *Stopped in their Tracks*, Forbes Magazine, May 30, 1988, p. 11.

arise from the authorized transaction. Such a result is necessary because no activity by any party can be allowed to frustrate consummation of the transaction authorized by the Commission and the public interest in that transaction which the Commission's approval entails. *Nemitz v. Norfolk and Western*, 436 F.2d 841, 845 (6th Cir.) *aff'd*, *Norfolk & Western R. Co. v. Nemitz*, 404 U.S. 37 (1971); *Kalo Brick, supra*, at 320. A necessary component of this regulatory framework is that other laws on occasion have been deemed to be preempted or superseded to the extent that the operation of those other laws stand as obstacles to the consummation of a Commission authorized transaction. *Brotherhood of Locomotive Engineers v. Boston and Maine Corp.*, 788 F.2d 724 (1st Cir.) *cert. denied*, 107 S.Ct. 111 (1986) ("*B&M*"). The courts have uniformly upheld the preemptive effect of the exercise of the Commission's authority without regard to which provision of the ICA the transaction is authorized under. *Brotherhood of Locomotive Engineers v. C&NW*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) ("*C&NW*"). (The court held the Commission's preemptive authority was a necessary part of the Commission's power without which the ICA's power to authorize mergers would be "completely ineffective." *C&NW, supra*, at 430-431, *citing RLEA v. U.S.*, 339 U.S. 142 (1950) and *United States v. Lowden*, 308 U.S. 225 (1939)). The Eighth Circuit's decisions in *MOPAC, supra*, and *BN, supra*, are in accord. In *MOPAC* the court held that the Norris-LaGuardia Act must give way to the Commission's power in the ICA to resolve labor disputes arising out of consolidation and trackage rights proceedings. In *BN* the Eighth Circuit held that the ICA overrides the RLA:

Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring

"fair wages and working conditions in the railroad industry." 49 U.S.C. 10101a(12). To accomplish this important but limited aim, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines . . . In these narrow circumstances, the ICA supersedes the authority of the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements. Were it otherwise, the ICC's authority in this area, and specifically its recent deregulatory actions, would be largely nullified. 848 F.2d at 862.

Respondent RLEA attempts to refute this case law with the contention that *MOPAC* and *C&NW* involved another section of the ICA (49 U.S.C. 11341(a)) and cannot be used to uphold the Commission's authority in cases concerning 10901. (*BN* however did involve the sale of a rail line under 10901). The presence of Section 11341(a) is not relevant to the issue. While *MOPAC* and *C&NW* arose in the context of a consolidation approved under Section 11343, thus bringing Section 11341(a) into play, there is nothing in either decision to suggest that the decisions were dependent upon that fact.<sup>12</sup> This is borne out by the Eighth Circuit's statement in *MOPAC* signalling its concern that the ICA's scheme for carrying out rail transac-

<sup>12</sup> 49 U.S.C. 11341(a) provides that the authority of the ICC under Subchapter III of Title 49 is exclusive and that a carrier or person or corporation participating in an approved or exempted transaction is exempt from the anti-trust laws and from all other law as necessary to let that person carry out the transaction.

tions would be undermined by labor's reliance on RLA rights:

It is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired. 782 F.2d at 112.

The court was not relying on the exemptive language of a single section of the ICA but upholding a coherent statutory scheme. This view of the relationship between the ICA and RLA has passed muster in other decisions. *B&M, supra*; *Burlington Northern Ry. Co. v. ARSA*, 503 F.2d 58 (7th Cir. 1974); *cert. denied*, 421 U.S. 975 (1975); as well as the *Nemitz, supra*, and *BN*, decisions noted above.

Further support for the preemptive effect of the statutory scheme administered by the Commission in the absence of express authority such as Section 11341(a) is found in the line of cases concerning the authority of the Civil Aeronautics Board. In *Kent v. CAB*, 204 F.2d 263 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953), the Second Circuit held that the CAB had the power, when approving airline mergers, to adjust seniority rights affected by those mergers without following RLA bargaining procedures. The court held this despite the lack of any specific statutory authority in the Civil Aeronautics Act comparable to Section 11341(a) of the ICA. See also, *American Airlines, Inc. v. CAB*, 445 F.2d 891, 895 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972) where the Second Circuit, citing *Kent*, stated "Congress has vested the Board with the power to approve air line mergers only upon

such terms as it determines to be just and reasonable . . . The broad scope of a similar provision in the ICA was recognized by the Supreme Court . . . *United States v. Lowden*." . . ."

See also, *Machinists v. Northeast Airlines*, 473 F.2d 549, 559-60 (1st Cir. 1972) (RLA procedures are not available

for disputes arising out of air carrier transactions approved by the CAB).<sup>13</sup> The import of these cases is simply that the lack of express statutory exemption does not bar the Commission from approving railroad transactions which may require the preemption of other laws to resolve the labor disputes that would otherwise impede or frustrate the sales transaction.

The Third Circuit also declined to uphold the supersession by the ICA on the ground that the order of the Commission approving the sale was "permissive" rather than "mandatory". Pet. App. 37a-38a. We first point out the fact that the majority of Commission order are "permissive"; including orders involving transactions subject

<sup>13</sup> The courts have also rejected as collateral attacks other actions filed to advance asserted RLA rights where in plaintiffs' view the agency cannot enforce the RLA. See *Oling v. ALPA*, 346 F.2d 270 (7th Cir. 1965); *Kesinger v. Universal Airlines*, 474 F.2d 1127, 1131-32 (6th Cir. 1973) and *Cary v. O'Donnell*, 506 F.2d 107, 110 (D.C. Cir. 1974). The Third Circuit attempted to distinguish this line of cases by pointing out claimed distinguishable factors in one such case *International Association of Machinists v. Northeast Airlines*, 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972). After the CAB had approved a merger between the Northeast and Delta Airlines one of the former carrier's unions sued to stop the sale pending bargaining over the effects of the sale under the RLA. The district court denied the injunction and the First Circuit affirmed holding that the airline had no duty to bargain over a merger already subject to CAB approval. Pet. App. 54a.

The Third Circuit points to three factors to support a claim of that case's inappropriateness to this case. Pet. App. 55a. The chief ground of distinction relied on by the *P&LE II* court was that while the *Northeast* court granted labor protections none were granted here. The RLEA here has *never* requested the imposition of labor protections. Further, the Third Circuit's distinction raises the issue of the Commission's authority to grant labor conditions as opposed to its mandate to do so. The Third Circuit's view obviously limits the Commission's authority over rail transactions to situations in which it must grant labor protections. We submit this is a distinction without support in law or logic.

to Section 11341(a) as to which this Court has recognized the Commission's exclusive authority, *ICC v. BLE, supra*. In addition, the Third Circuit's distinction was rejected by this Court in *Venner, supra*, where it held that the fact "the order is not mandatory but permissive makes no difference in this regard." 271 U.S. at 131.<sup>14</sup> The permissive-mandatory distinction was also rejected by the Second Circuit in *Railway Labor Executives' Association v. Staten Island Railroad*, 792 F.2d 7, 12 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 927 (1987) ("*Staten Island*").

The Third Circuit attempts to distinguish *Staten Island* on the ground that the order in that case required the seller to consummate the transaction. (Pet. App. 38a, n.27). The distinction is contrary to the rationale of *Venner*. Moreover, the Second Circuit's decision also involved a permissive sale of trackage rights approved by the Commission under 49 U.S.C. 10901. See 792 F.2d at 10, n.5.<sup>15</sup>

The Third Circuit also denied the ICA's supersessive effect because of the "permissive" nature of the labor condi-

<sup>14</sup> The Third Circuit distinguished *Venner* on the ground that the injunction sought in that case "truly would have blocked the approved transaction as violative of state law, as opposed to merely delaying the transaction pending the "exhaustion of bargaining" and because that case, "at bottom, was a federal preemption case. . ." Pet. App. 38a-39a, n.27. Regardless of the court below's characterization of the case, the Commission authorized consummation of the P&LE sale without delay and certainly without awaiting the exhaustion of bargaining which might never result in a resolution of the issues in dispute. Furthermore, the seller was bound by the contract to consummate the sale once the necessary ICC approval was received.

<sup>15</sup> Other courts of appeals have given the same meaning to *Venner* as the Second Circuit and rejected RLEA attempts to have RLA rights engrafted on to a Commission approved transaction as collateral attacks on Commission orders. *United Transportation Union v. Norfolk & Western R. Co.*, 822 F.2d 1114, 1120-1121 (D.C. Cir. 1987), *cert. denied*, 56 U.S.L.W. 3460 (1988); *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.* 788 F.2d 794, 799-802 (1st Cir. 1986), *cert. denied*, 107 S.Ct. 111 (1986).

ditions available under 10901. (Pet. App. (No. 87-1589) 13a, n.8). In this view, the mandate of the Commission to impose labor protective conditions, as opposed to its discretion to do so, becomes the touchstone of ICA's supersessive power. This second "mandatory-permissive" distinction is also illogical. The presence or absence of mandatory labor protections can have no bearing on the authority of the Commission to resolve labor disputes arising out of the authorization of a transaction. The creation of this distinction reduces Commission jurisdiction to an outcome-determinative test. If the Commission imposes labor protections it has exclusive and plenary jurisdiction, if it does not impose such protections jurisdiction over the transaction passes to the RLA. This construction of the statute invites rail labor to challenge the Commission's jurisdiction in cases where, in rail labor's view, the labor protections afforded are deemed insufficient.

#### **D. THE INTERSTATE COMMERCE ACT IS A LABOR STATUTE TO WHICH OTHER LABOR STATUTES MUST BE ACCOMMODATED**

At bottom, what drives the challenged decisions of the Third Circuit is the determination that the ICA is not a labor statute. Pet. App. (No. 87-1598) 7a-8a; Pet. App. (No. 87-1888) 44a-52a. The court's denial of the ICA's status as a labor law deprives it of the force that supports accommodation of the RLA and NLGA. Pet. App. (No. 87-1888) 44a. In arriving at this unprecedented holding the Third Circuit relied on two factors.<sup>16</sup> First, it held that,

<sup>16</sup> It is the Commission's view that the cases relied on by RLEA as supporting the decision of the P&LE majority may be read as authority only for the proposition that the regulatory process may not be used solely to accomplish objectives that management was unable to obtain through collective bargaining.

The prevention of resort to use of the Commission's authority to override the RLA to bypass an ongoing negotiation process appears to be the basis for the recent Seventh Circuit decision in *Burlington Northern Railroad Company v. United Transportation Union*, No. 88-2180 (7th Cir., November 18, 1988). Burlington Northern designed and implemented a rail service using fewer crew members than the normal complement (slip op. 2). Local committees of UTU comprising the carrier's Northern Line, however, refused to agree to the new service (slip op. 3). Burlington Northern granted its wholly-owned subsidiary, Winona Bridge, a bridge with five employees, trackage rights over the Northern Line giving Winona Bridge significant rights to the use of the track, with crews of its choosing and not subject to the existing collective bargaining agreements (slip op. 3-4).

Winona Bridge sought and obtained ICC authorization pursuant to 49 U.S.C. 10505 and 49 U.S.C. 11343 to implement the agreement. UTU challenged the agreement and Burlington Northern filed a district court action seeking relief against a threatened strike by the unions (slip op. at 4-5).

On review the Seventh Circuit found the trackage rights agreement to be "an attempt . . . to evade unilaterally the . . . rights vested in the Unions through the use of a trackage rights agreement . . ." (slip op. at 11). This attempt, implemented "only after preliminary negotiations proved unsuccessful" left ". . . little doubt" that Burlington Northern "was intentionally avoiding its obligations to the unions . . ." (slip op. at 14) by "transferring rights to an extension of itself" (slip op. at 17) citing, *Butte, Anaconda & Pacific Ry v. Brotherhood of Locomotive Firemen and Engineers*, 268 F.2d 54 (9th Cir.), cert. denied, 361 U.S. 864 (1959).

The same exception to the Commission's exclusive authority can be seen in the recent decision *RLEA v. City of Galveston, Texas*, 849 F.2d 135 (5th Cir. 1988) *pet. for cert. pending*, No. 88-517 (September, 1988). There, Galveston Wharves suffered severe economic losses over 1985 and 1986. Its management opened discussion with its railway labor unions in an effort to obtain wage and work-rule concessions. After these discussions ended without agreement, Galveston Wharves proposed to sell all of its railroad assets and to lease its terminal railroad facilities to a new firm, Galveston Railway, Inc. (GRI). Galveston Wharves announced its intention to

(footnote continued on next page)

if Congress had intended that the RLA dispute resolution procedures not apply to ICC approved transactions, Congress would have amended the RLA to so provide. Pet. App. 39a. Second, the Third Circuit majority took a cursory look at the policies in the national transportation policy "upon which the ICC must focus." Pet. App. 46a. It found "only one directs the ICC's attention to the interests of labor, viz. Section 10101a(12)." Pet. App. 46a-47a. On this basis it declared: "Nothing in the statutory language (of the ICA) suggests that this incidental reference to 'fair wages' (in Section 10101a(12)) converts the regulatory scheme over rail transport into a labor law." *Id.* at 48a.<sup>17</sup>

These two critical findings ignore the facts. First, the court failed to recognize that RLA dispute resolution procedures have *not* been applicable to ICC approved rail

do so unless the unions agreed to a 26.4 percent reduction in wages and benefits. With the unions refusal to do so, Galveston Wharves sought and received Commission approval for the transaction. 849 F.2d 146-147. The Fifth Circuit ultimately held that under the circumstances of that case Commission approval did not displace the RLA. *Id.* at 152. This refusal to allow the abuse of the regulatory process is also clearly seen in this Court's opinion in *County of Marin v. United States*, 356 U.S. 412 (1957) and in the decision of the Fifth Circuit in *Texas & New Orleans R.R. Co. v. Brotherhood of R.R. Trainmen*, 307 F.2d 151 (5th Cir. 1962) cert. denied, 372 U.S. 952 (1963). We submit that the concerns that motivated the prior decisions—an attempt to abrogate existing collective bargaining agreements where negotiations to modify such agreements under RLA processes had failed—are not present here.

<sup>17</sup> The Eighth Circuit looked at the same Section 10101a(12) policy and concluded that the ICA does supersede the RLA. *BN v. UTU*, *supra*, 848 F.2d at 862. See also, Judge Hutchinson's dissent, Pet. App. 63a. "Prohibiting the sale and maintaining the status quo until RLA bargaining procedures are exhausted largely ignores all but one of the fifteen factors, viz: labor interests."

transactions for fifty years.<sup>18</sup> Second, the Congress, when considering the issues of labor protections for employees, dealt with them by amending the ICA and not the RLA. The amendments to the ICA over the years belie the court's assertion that it is not a labor statute and in fact proves that the ICA is indeed a labor statute.

Indeed, the history of rail labor is in large measure a history of the Commission and its authority over rail labor management issues arising out of approved rail transactions. The Transportation Act of 1920 (41 Stat. 456) amended the ICA to include provisions giving the ICC jurisdiction over abandonments, line sales to non-carriers and other single carrier transactions (Sections 1 (18) and (20), 41 Stat. 477-478)), and over mergers and other multicarrier transactions (Section 5(2), 41 Stat. 481). In *Lowden, supra*, 308 U.S. at 238 (1939), this Court confirmed the discretionary authority of the Commission to condition its approval of mergers and other multicarrier transactions pursuant to Section 5 (2) of the amended ICA upon protection of employees when the Commission found doing so to be in the public interest — authority that may “promote the public interest . . . by facilitating the national policy of railroad consolidation . . . by prevent(ing) interruption of interstate commerce through labor disputes growing out of labor grievances”.

In 1936 the Washington Job Protection Agreement was adopted. In that document, the major railroads and union agreed that, in railroad “coordinations”, there would be binding arbitration of labor issues permitting consumma-

<sup>18</sup> The *P&LE II* court held (Pet. App. 6a) that Congress “has not chosen to relieve management of any of the onerous burdens imposed by the RLA.” As we will demonstrate, since the adoption of Washington Job Protection Agreement in 1936, there have been *no* burdens imposed by RLA on Commission authorized transactions.

tion of the transaction. Speedy, mandatory arbitration (outside of RLA) allowing railroads to change the status quo by completing the merger, sale or transfer, and to achieve the benefits of the agreed upon transaction, has been the norm since that time. See, *New York Dock Ry. Co. v. United States*, 609 F.2d 832, 86-90 (2d Cir. 1979), approving standard Commission imposed labor protective conditions in carrier consolidations which subsumed the WJPA process. F.D. No. 30532, *Maine Central R.R., Georgia Pacific Co., Canadian Pacific Ltd. and Springfield Terminal Railway Co. — Exemption from 49 U.S.C. 11342 and 11343, aff'd sub. nom. RLEA v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987). These conditions permit consummation of the transaction after an agreement is reached through prompt, binding arbitration. See, also, *RLEA v. United States*, 675 F.2d 1248 (D.C. Cir. 1982) approving Commission imposition of labor conditions on carriers granting trackage rights and leases to another carrier. These conditions permit consummation prior to reaching agreement through binding arbitration. With minor variations, these conditions (which avoid the RLA's notice, status quo and dispute resolution provisions) have been applied in virtually all railroad combinations, sales and other transactions, including abandonment of rail lines, since that time.

The Transportation Act of 1940, *supra*, amended Section 5 of the ICA to mandate employee protections as a condition of the Commission's approval of merger and other multicarrier transactions.<sup>19</sup> Indeed, those mandatory protections constituted a minimum and the Commission retained discretion to impose additional labor protections. *Railway Labor Association v. United States*, 339 U.S. 142 (1950).

<sup>19</sup> The *Lowden* court noted the pendency of the legislation that became the 1940 Transportation Act and concluded that the Act did not negate the conclusion that the ICC had implied power over labor protection but that Congress merely sought to make mandatory what had been discretionary. *Lowden, supra*, at 239.

The 4R Act, *supra*, included provisions, enacted as Section 1a of the ICA, which separated abandonments from other single carrier transactions which had been governed by Section 1 (18) and mandated employee protections for certain approved abandonments. However, the Commission retained "discretion" to fit employee protections "to the facts and circumstances attending a particular abandonment." *Simmons v. ICC*, 697 F.2d 326, 336 (D.C. Cir. 1982).<sup>20</sup> The Staggers Rail Act, *supra*, made labor protections mandatory in connection with the abolition of railroad rate bureaus (Section 219(g)) and the sale of a line under the feeder line program (49 U.S.C. 10910(j)); prohibited exemptions from provisions of the ICA without required labor protection (49 U.S.C. 10505(g)(2)); and prohibited the Commission from imposing protections on sales of lines under Section 10905 as well as giving the Commission discretion to impose protective conditions on the construction of new rail lines and sales of existing lines to new operators.<sup>21</sup>

This extensive history of the ICC rail labor dispute resolution authority was ignored by the Third Circuit. This history demonstrates conclusively that the ICA is a labor statute and has maintained that status for fifty years. Moreover, this history also refutes the *P&LE II*

<sup>20</sup> The ICA was codified and reenacted in 1978 as Subtitle IV of 49 U.S. Code, 92 Stat. 1337. The authority of the ICC over line sales and other single carrier transactions apart from abandonments was codified as Section 10901; its authority over abandonments was codified as Section 10903; and its authority over mergers and other multicarrier transactions was codified as Sections 11341-11347; the recodification was without substantive change.

<sup>21</sup> It should also be noted that in passing the Staggers Act Congress voted down an attempt, contained in the House version of the bill, to make labor protections mandatory in the sale of rail lines under section 10901. See, H.R. Rep. 1430, 96th Cong. 2d Sess. 115-116 (1980).

court's contention that the agency has no labor expertise and that Congress could not have intended it to be the arbiter of rail labor disputes. Pet. App. 51a.

The only logical reading of the ICA confirms that it is a labor statute when dealing with disputes arising out of rail transactions committed to the Commission by Congress. It is the *only* rail labor statute Congress contemplated for resolving labor disputes which arise out of ICC approved or exempted rail transactions. The Congress has been aware of the Commission's role in this area. In amending the ICA Congress has at times required greater and at times lesser protection for various Commission transactions.<sup>22</sup> But in either event the Congress has certainly intended the Commission to be the sole arbiter of rail labor disputes arising out of Commission authorized transactions.<sup>23</sup>

<sup>22</sup> In fact, the ICA has more indicia consonant with a labor statute than the RLA. The RLA provides only procedural protections. The ICA provides procedural protections and either mandatory or discretionary substantive protections such as wage guarantees, severance pay, and moving expenses, etc. See, *New York Dock Ry. - Control - Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 76, 84 (1979), *aff'd sub. nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

<sup>23</sup> The *P&LE II* decision holds that the Congress intended the RLA and ICA to "co-exist", Pet. App. 50a citing *P&LE I*, *supra* at 1236. *P&LE I* in turn cites the case of *Order of R.R. Telegraphers v. Chicago & Northwest Ry. Co.*, 362 U.S. 330 (1960) ("*ORT*") as rejecting "arguments comparable to those made by *P&LE*" in support of the ICA's supersession of the RLA and NLGA. *P&LE I*, *supra* at 1236. In *ORT*, the Court refused to enjoin a strike growing out of a labor dispute that arose out of a railroad's decision to close several stations. To the *P&LE* Court this case limits the ICA's supersession of the RLA and NLGA. However, *ORT* did not concern the Commission's authority over a rail transaction. Indeed, the Commission's authority was in no way implicated in that case. Moreover, *ORT* and

(footnote continued on next page)

**E. THE PROCEDURES ESTABLISHED IN EX PARTE 392 ARE DESIGNED TO RESOLVE RAIL LABOR DISPUTES PEACEFULLY AND ARE AS ENTITLED TO PROTECTION AS ARE THE COMPARABLE PROCEDURES OF THE RLA**

The Congress enacted the NLGA, *supra*, "to remedy the growing tendency of federal courts to enjoin strikes by narrowly construing the Clayton Act's labor exemption from the Sherman Act's prohibition against conspiracies to restrain trade . . ." *Jacksonville Bulk Terminals v. Longshoremen*, 457 U.S. 702, 708 (1982). While the Court has given a broad interpretation to the anti-injunction provision of the Act, the Court has also held them to be inapplicable "where necessary to accommodate the Act to specific federal legislation or paramount congressional policy." (*Id.*).

This accommodation doctrine reflects the rule that consideration must be given to the "total corpus of pertinent law and the policies that inspire ostensibly inconsistent provisions." *Boys Markets v. Clerks' Union*, 398 U.S. 235, 250 (1970). By this process the court can interpret statutes in ways that "make sense". *Fausto, supra*. Two leading cases in this area are *Chicago River, supra*, and *Boys Market, supra*. In *Chicago River*, this Court held that federal courts could enjoin a strike to protect the jurisdiction of the National Railroad Adjustment Board so the Board could resolve the rail labor dispute through the arbitration procedure established under RLA. In *Boys*

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another case relied on by the *P&LE* majority, *Texas & New Orleans R.R. Co. v. Brotherhood of R.R. Trainmen, supra*, were decided well before the passage of the significant rail legislation designed to halt the decline of the rail industry, and many of this Court's decisions confirming the exclusive and plenary jurisdiction of the Commission over rail transactions. Thus, *ORT* has no vitality in the case before the Court.

*Market*, the Court held that NLGA did not deprive the courts of jurisdiction to enjoin a strike where the dispute was subject to a Labor Management Relations Act, 29 U.S.C. 141, *et seq.* arbitration procedure. The procedures established by *Ex Parte 392* in Section 10901 transactions are akin to those protected by the Court in *Chicago River* and *Boys Market* and require protection so that they may be allowed to work notwithstanding the NLGA.

Like the procedures in the above named cases, the procedures here channel rail labor disputes arising out of the Section 10901 sales transaction into a peaceful resolution of the issue. The method established for this resolution is the petition for revocation of the exemption. Section 10505(d) of the ICA makes this remedy available to any party with a claim that the exemption was improperly granted or is in any way deficient. 49 CFR 1150. Through this device any party can attempt to demonstrate to the Commission that labor protective conditions are warranted in the public interest. The Commission is required to act on the petition and by way of remedy may terminate the exemption, cancel its approval or impose labor conditions. This Commission determination is of course reviewable in the courts of appeals. 28 U.S.C. 2341. What the Commission has available in the *Ex Parte 392* procedures is a comprehensive administrative scheme to resolve any dispute arising out of the transaction that is equivalent to the processes protected by the Court in *Boys Market* and *Chicago River*.<sup>24</sup>

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<sup>24</sup> While the ICA is certainly a labor law for the purposes of rail transactions approved under 10901 it may be suggested that the accommodation doctrine only applies to statutes that qualify "formally" as labor laws. However, neither *Chicago River* or *Boys Market* mandates such a requirement. Further, non labor law statutes have been considered to have administrative procedures which require protection

**F. THE THIRD CIRCUIT'S DECISIONS DESTROY THE COMMISSION'S ABILITY TO FOSTER RAIL TRANSPORTATION SERVICE IN THE PUBLIC INTEREST**

The Third Circuit decision contends that the RLA and ICA must be read together in order to save RLA from an implied repeal. Pet. App. 6a. As we have demonstrated this case is not about the repeal of the RLA (Argument, Section B, *supra*). The RLA has no applicability to rail transactions committed by Congress to the Commission. Moreover, to read the RLA into the process of rail transactions reads the ICA out of the process. Any determination by the Commission that labor protections are not appropriate to a rail transaction becomes purely advisory if the transaction is subject to the RLA. Any rail transaction is henceforth subject to a rail labor veto with the invocation of the RLA. The Commission's determination about the public interest with respect to the transaction which is required to take into account among other things the interests of rail employees becomes a nullity.

Two conflicting regimes are here presented to make one determination—Whether and what labor protections are appropriate in rail line sales transactions. In the regime proposed by the Commission, the interests of all relevant participants including rail employees will be balanced in determining whether to authorize the transaction as in the public interest and what conditions, if any, to impose for the protection of employees. In the regime imposed by the Third Circuit, rail labor will decide whether, or on what

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from the courts. See, *Boston and Maine Corp. v. Lenfest*, 799 F.2d 795, 800-804 (1st Cir. 1986) *cert. denied*, 107 S.Ct. 1333 (1987). (Where Congress has channeled labor disputes arising out of the Federal Railroad Safety Act (FRSA) 45 U.S.C. 441 *et seq.* into an arbitration procedure the court could enjoin the union from striking once the procedure became available).

terms, the transaction should be consummated despite the public interest determination of the Commission. The Commission's public interest finding will always be subordinate to any dissatisfaction by rail labor with the protections afforded because of the unfettered ability to strike created by the decision of the court below. This was not the intent of Congress when it established the Commission as the agency with the authority and power to maintain the nation's rail transportation system. The decisions of the court below destroy the Commission's ability to implement an important congressional program and must be overturned. *Udall v. Tallman, supra*.

**CONCLUSION**

The judgments of the court of appeals should be reversed.

Respectfully submitted.

ROBERT S. BURK  
*General Counsel*

HENRI F. RUSH  
*Deputy General Counsel*

JOHN J. MCCARTHY, JR.  
*Deputy Associate General Counsel*

CLYDE J. HART, JR.  
*Attorney*  
*Interstate Commerce Commission*  
*12th Street & Constitution Ave., N.W.*  
*Washington, D.C. 20423*

JANUARY 1989

JAN 19 1989

JOSEPH E. SPANIO, JR.  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Respondent.*

THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
INTERSTATE COMMERCE COMMISSION,  
*Respondents.*

**ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT**

**JOINT APPENDIX**

RICHARD L. WYATT, Jr.\*  
RONALD M. JOHNSON  
CHARLES L. WARREN  
AKIN, GUMP, STRAUSS,  
HAUER & FELD  
1333 New Hampshire Ave., N.W.  
Suite 40<sup>n</sup>  
Washington, D.C. 20036  
(202) 887-4000

WILLIAM G. MAHONEY  
JOHN O'B. CLARKE, JR.\*  
HIGSAW & MAHONEY, P.C.  
Suite 210  
1050 17th Street, N.W.  
Washington, D.C. 20036  
(202) 296-8500  
*Counsel for Respondent*

G. EDWARD YURCON  
THE PITTSBURGH & LAKE ERIE  
RAILROAD COMPANY  
780 Commerce Court  
Four Station Square  
Pittsburgh, Pennsylvania 15219  
(412) 263-3806  
*Counsel for Petitioner*

*\*Counsel of Record*

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**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT  
OF PENNSYLVANIA**

No. 87-1745

**Docket Entries**

DATE	NR.	PROCEEDINGS
1987		C.A. 87-1745 (Railway Labor Executives As- soc. v. Pgh. & Lake Erie R.R.)
Aug. 19	1	Complaint for Declaratory & Injunctive Relief filed.
Aug. 19	—	Summons issued.
Aug. 24	2	Return of service of summons & complaint filed by pltf. on deft. Pgh & Lake Erie Railroad Co. by certified mail on 8-20-87.
Sept. 9	3	Entry of appearance of John J. Repenack, Esq. as counsel for deft. filed.
Sept. 9	4	ANSWER of deft. filed.
Sept. 14	5	<b>NOTICE fixing status for 12/8/87 at 3:30</b>
Sept. 16	6	Entry of appearance of counsel on behalf of Pgh & Lake Erie Railroad Co filed by Atty Richard Wyatt, 1333 New Hampshire Avenue, Washington, D.C.
Sept. 16	7	Temporary restraining order and order to show cause filed by deft with a proposed order.
Sept. 16	8	Motion for temporaty retraining order and pre- liminary injunction filed by deft.
Sept. 16	9	Notice of filing of first amended answer as of course and notice of motion for temporary or- der filed by deft.
Sept. 16	10	First amended ANSWER filed by deft.
Sept. 16	11	Affidavit of Gordon E. Neuenschwander filed.
Sept. 16	12	Affidavit of James D. Peters filed.
Sept. 17	13	TRO nearing held before Rosenberg, J on 9- 16-87 and 9-17-87 (Rep: Don Harrington) memo filed; motion for TRO withdrawn; exhibit list attached thereto.

Sept. 18 14 Opposition of Railway Labor Executives Association to application for temporary restraining order filed. (Missing)

Sept. 18 15 Declaration of Robert A. Scardelletti filed.

Sept. 21 16 Transcript of proceedings of the testimony of Gordon E. Neuenschwander on 9-16-87 Rosenberg, J filed by Official Ct. Reporter Donald Harrington.

Sept. 21 17 Notice of motion for temporary restraining order filed by deft.

Sept. 21 18 Motion for temporary restraining order and preliminary injunction filed by deft which a proposed order.

Sept. 21 19 Certificate of service of the notice of motion for TRO and preliminary injunction memorandum of points and authorities on pltf on 9-21-87 filed by Ronald M. Johnson.

Sept. 21 20 First supplemental affidavit of Gordon E. Neuenschwander filed.

Sept. 21 21 First supplemental affidavit of James D. Peters filed.

Sept. 22 22 Transcript proceedings of nearing held on 9-21-87 before Bloch, J filed by official Ct. Reporter Jordan Lilienthal.

Sept. 22 23 Motion for TRO hearing held before Bloch, J (Rep: J. Lilienthal; memo filed; Judge denied defts motion for TRO.

Sept. 22 24 Attachments to Motion for TRO filed by deft.

Sept. 22 25 Motion to withdraw counsel filed by John J. Repcheck, Esq. with a proposed order.

Sept. 23 25 Order entered dated 9-23-87, directing that the appearance of John J. Repcheck, Esq. & Sharlock, Repcheck & Mahler as attys for deft. Pgh. & Lake Erie Railroad Co. is withdrawn. (Bloch, J.)

Sept. 24 — Pursuant to order entered, John J. Repcheck, Esq & Sharlock, Repcheck & Mahler are hereby withdrawn from this case.

CATHERINE D. MARTRANC, CLERK

Sept. 28 26 Transcript of Motion for TRO held 9-21-87 before Bloch, J. filed. (Rept: J. Lilienthal)

Sept. 30 27 MOTION to DISMISS By deft.

Sept. 30 28 SECOND SUPPLEMENTAL AFFIDAVIT of James D. Peters

Oct. 2 29 ORDER Dated 10-1-87 that pltf. file reply brief to deft's Motion to Dismiss by 10-16-87. EOD: 10-2-87; cm: all parties of record. (Bloch, J.)

Oct. 5 30 SECOND SUPPLEMENTAL affidavit of Gordon E. Neuenschwander.

Oct. 5 31 NOTICE OF RENEWED MOTION for temporary restraining order and preliminary injunction by deft.

Oct. 5 — TEMPORARY restraining order and order to show cause recd from deft.

Oct. 7 32 DECLARATION of William Larue

Oct. 7 33 ANSWER to COUNTERCLAIM By pltf.

Oct. 7 34 AFFIDAVIT of R.E. Smith

Oct. 8 35 THIRD SUPPLEMENTAL AFFIDAVIT of James D. Peters

Oct. 8 36 FINDINGS OF FACT. EOD: 10-8-87; cm: all parties of record. (Bloch, J.)

Oct. 8 37 TEMPORARY RESTRAINING ORDER dated 10-8-87 that pltf's are restraining from picketing or interfering with deft's operations: pltf's to issue notice to take necessary steps to effect TRO; Court to retain jurisdiction to issue; TRO to remain in effect until Court rules on deft's preliminary injunction. EOD: 10-8-87; cm: all parties of record. (Bloch, J.)

Oct. 8 38 NOTICE OF APPEAL FROM ORDER dated 10-8-87 by pltf. (FEE PAID-TPO GIVEN)

Oct. 9 — CERTIFIED Copy of Notice of Appeal & docket entries, copy of information sheet & ORDER dated 10-8-87 appealed from mailed to Ct of Appeals; copy of appeal & information sheet to Bloch, J. deft's counsel, J. Lilienthal, Ct. reporter; copy of information sheet to pltf's counsel.

Oct. 9 39 HEARING ON DEFT's Motion for TRO held 10-8-87 before Bloch, J; memo filed. (Rept: J. Lilienthal)

Oct. 13 40 TRO ording transcript of 10-8-87 by pltf. counsel.

Oct. 16 — COPY of LETTER from SUCA advising appeal docketed at 87-3664.

Oct. 16 40a TRANSCRIPT of TRO held 10-8-87 before Bloch, J. (Rep: J. Lilienthal)

Oct. 19 41 NOTICE scheduling Status Conf for 1-5-88 at 3:30 PM before Bloch, J.

Oct. 19 42 OPPOSITION to deft's Motion to Dismiss by pltf.

Oct. 28 43 CERTIFIED COPY of order from USCA reversing & remanding order of District Court of 10-8-87.

Nov. 2 — SLIP OPINION rec'd from USCA reversing & remanding order of District Court of 10-8-87

Nov. 12 44 REPLY to pltf's opposition to deft's Motion to Dismiss by deft.

Nov. 16 45 MOTION for PRELIMINARY INJUNCTION by deft w/prop order

Nov. 16 46 APPLICATION for TRO by pltf.

Nov. 16 47 MOTION for Summary Judgment by pltf.

Nov. 16 48 MOTION for Prelim. Injunction by pltf.

Nov. 17 49 FOURTH SUPPLEMENTAL AFFIDAVIT of James D. Peters.

Nov. 18 50 OPPOSITION to pltf's motion for summary judgment & its alternative request for injunctive relief by defts.

Nov. 18 51 CERTIFICATE of SERVICE of Opposition to pltf's motion for summary judgment by deft.

Nov. 18 52 OPPOSITION to deft's Motion for Prelim. Injunction by pltf.

Nov. 19 53 FIFTH SUPPLEMENTAL AFFIDAVIT of James D. Peters

Nov. 23 54 ERRATA SHEET to deft's opposition to pltf's motion for summary judgment & its alternative request for injunctive relief by deft.

Nov. 25 55 TRANSCRIPT of telephone conference held 11-20-87 before Bloch, J. (Rept: V. Pease) (filed this number)

Nov. 25 56 TRANSCRIPT of telephone conference of 11-23-87 cm: all parties of record. (Bloch, J.)

Nov. 25 57 OPINION date 11-24-87. EOD: 11-25-87 cm: all parties of record. (Bloch, J.)

Nov. 25 58 ORDER dated 11-24-87 that deft's motion to dismiss is denied; pltf motion for summary judgment is granted; further that deft to comply w/provisions of the Railway Labor Act in re: resoltuion of the major dispute; further that deft is enjoined from altering the rates of pay, rules & working conditions; futher that the sale deft's assets in enjoined to the extent that such sale does not provide for the maintainence of status quo. EOD: 11-25-87 cm: all parties of record. (Bloch, J.)

Nov. 25 — NOTICES mailed

Nov. 25 59 NOTICE OF APPEAL of ORDER dated 11-24-87 by deft. (FEE PAID-TPO GIVEN)

Nov. 25 — CERTIFIED copy of notice of appeal & docket entries; orig. of information sheet & ORDER dated 11-24-87 appealed from mailed to USCA; copy of notice of appeal & information sheet to Bloch, J., all counsel or record, Ct. Repts: V. Pease & J. Lilienthal; copy of info sheet to deft's counsel.

Dec. 2 60 ORDER dated 12/2/87 that opinion of 11-24-87 is amended as further stated in order EOD: 12-2-87 cm: all parties of record. (Bloch, J.)

Dec. 7 — LETTER from USCA advising appeal docketed at 87-3797

- Dec. 14 61 CERTIFIED COPY of order from USCA that appellant's emergency motion for summary reversal of stay of injunction pending appeal is denied; motion by ICC for leave to intervene in support of appellant is granted.
- 1988
- Apr. 18 — SLIP OPINION from USCA, vacating USDC's order of summary judgment in favor of pltf, Union & ordering deft to bargain under RLA & remand w/instructions to dismiss.
- Apr. 25 — INFORMATION SHEET on POST DECISION matters from USCA advising a petition for writ of certiorari was filed on 3-24-88 in the Supreme Ct. as S.C. #87-1589.
- May 4 62 CERTIFIED COPY of judgment from USCA affirming judgment of USDC of 11-25-87. Costs taxed against appellant.
- May 4 — SLIP OPINION from USCA.; Receipt for same mailed to USCA
- June 15 — INFORMATION SHEET on POST DECISION matters from USCA advising that a petition for writ of certiorari was filed on 5-17-88 in the Supreme Ct. at S.C. #87-1888
- Sept. 6 — INFORMATION SHEET on POST DECISION matters from USCA advising a petition for writ of certiorari was filed 8-5-88 in the Supreme Ct. at S.C. #88-217
- Dec. 5 — INFORMATION SHEET on Post Decision matters from the USCA advising that a petition for writ of certiorari was granted on 11-28-88.
- Dec. 7 — Info Sheet, Petition for Writ of Certiorari was denied on 11/28/88
- 1989
- Jan. 3 63 LETTER requesting record to be forwarded to the U.S. Supreme Court received from Court of Appeals.
- Jan. 4 — ORIGINAL Certified record forwarded to U.S. Supreme Court

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT  
OF PENNSYLVANIA

Civil Action No. 87-1745

RAILWAY LABOR EXECUTIVES' ASSOCIATION  
400 First Street, N.W., Suite 804  
Washington, D.C. 20001

*Plaintiff*

v.

PITTSBURGH & LAKE ERIE RAILROAD CO.  
Commerce Court  
Four Station Square  
Pittsburgh, Pennsylvania 15219

*Defendant*

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

1. In this complaint plaintiff Railway Labor Executives' Association ("RLEA") seeks to enforce the rights of the employees of defendant Pittsburgh & Lake Erie Railroad Co. ("P&LE") under the Railway Labor Act ("RLA"), 45 U.S.C. §151, *et seq.* The claims presented in this case arise from P&LE's decision to sell its rail lines and operating properties without providing its employees with notice of that sale and opportunity for negotiations as is required by the RLA. The RLEA seeks an order declaring that the P&LE must comply with the requirements of the RLA before implementing the transaction and an order enjoining P&LE from proceeding with the transaction until all RLA processes are exhausted.

### PARTIES

2. Plaintiff RLEA is an unincorporated association of the Chief Executive Officers of nineteen (19) labor organizations which collectively represent most of the organized rail employees in this country, including virtually all of P&LE's organized employees. A list of RLEA's member organizations is attached hereto as RLEA Exhibit 1.

3. The labor organizations which represent P&LE employees and whose chief executive officers are members of the RLEA are "representative[s]" as that term is defined in Section 1 Sixth of the Railway Labor Act, 45 U.S.C. §151 Sixth. Those organizations are the duly designated representatives of various crafts or classes of P&LE employees, including employees who work and live in this judicial district.

4. Defendant P&LE owns and operates a 182 mile rail line which runs from Connellsville, Pennsylvania to Youngstown, Ohio and is a rail carrier within the meaning of Section 1 First of the RLA, 45 U.S.C. §151 First.

### JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this cause of action by virtue of 28 U.S.C. §§1331 and 1337 because this action is to enforce rights under the RLA (an Act of Congress to regulate interstate commerce). The Court has the jurisdiction to issue a declaratory judgment and incidental injunctive relief under 28 U.S.C. § 2201, *et seq.*

6. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391(b) and (c) because defendant maintains its offices in this district and does business in this district.

### CAUSE OF ACTION

7. Various labor organizations whose chief executive officers are members of the RLEA have collective bargaining

agreements with P&LE which cover the various crafts and classes of P&LE employees.

8. On July 31, 1987, the P&LE notified its employees that it had reached "an agreement with a subsidiary of the Chicago West Pullman Transportation Corporation, which when finalized, would result in its purchase of all the P&LE's rail lines and operating properties" as well as "a substantial number of freight cars and all the P&LE's operating locomotives." A copy of P&LE's letter is attached hereto as RLEA Exhibit 2.

9. On August 7, 1987, in response to this notification, various rail labor organizations sent telegrams or letters to the President of the P&LE advising that those labor organizations believed that the sale of P&LE's rail line, operating properties and other assets would constitute a change in the working conditions of its employees and that P&LE could not implement the proposed sale without compliance with the requirements of Section 6 of the RLA regarding notice and negotiations. The various organizations also requested that they be provided with certain information about this transaction. Copies of telegrams and letters sent by various rail labor organizations are attached hereto as RLEA Exhibits 3a-3d.

10. The Railway Labor Act requires that rail carriers provide rail unions with at least thirty (30) days written notice of any intended change in rates of pay, rules, or working conditions and to negotiate concerning any such intended change, RLA Section 6, (45 U.S.C. §156); that rail carriers not change rates of pay, rules, and working conditions except as prescribed by Section 6, RLA Section 2 Seventh (45 U.S.C. §152 Seventh); and that carriers must "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes. . . ." RLA Section 2 First (45 U.S.C. §152 First).

11. As of the date of this complaint, P&LE has not responded to the letters and telegrams sent by rail labor other than to send a letter dated August 10, 1987, to some organizations stating that P&LE would respond to their letters or telegrams within a week. Copies of two of those letters are attached hereto as RLEA Exhibits 4a and 4b.

12. As of the date of this complaint, the P&LE has not responded substantively to the letters and telegrams sent by rail labor or provided the various rail labor organizations which represent its employees of notice of the agreement to sell its rail lines, operating properties and certain assets in the manner which is required by the RLA.

13. As of the date of this complaint, the P&LE has not sought negotiations with the various rail labor organizations which represent its employees as is required by the RLA.

14. Should the P&LE proceed with the sale of its rail line, operating properties and certain other assets without first providing the labor organizations which represent its employees with notice of the sale in the manner required by the RLA and participating in negotiations concerning the sale, including its decision to make the sale and its effects on P&LE employees, the P&LE will violate Section 2 First and Seventh and Section 6 of the RLA.

15. Should the P&LE proceed with the sale of its rail line, operating properties and certain other assets without first providing the labor organizations which represent its employees with notice of the sale in the manner required by the RLA and participating in negotiations concerning the sale including its decision to make the sale, and its effects on P&LE employees, the P&LE will fail to make every reasonable effort to settle all disputes and maintain its collective bargaining agreements with the various labor organizations which represent its employees, in violation of Section 2 First of the RLA.

16. Should the P&LE proceed with the sale of its rail line, operating properties and certain other assets without first providing the labor organizations which represent its employees with notice of the sale in the manner required by the RLA and participating in negotiations concerning the sale, including its decision to make the sale and its effects on P&LE employees, its employees will be irreparably harmed.

### RELIEF REQUESTED

WHEREFORE, plaintiff RLEA respectfully requests that this Court:

A. Declare that P&LE is required by the Railway Labor Act to negotiate with the unions representing its employees before completing the sale of its rail line, operating properties and certain assets;

B. Declare that P&LE must make every reasonable effort to maintain the agreements covering the employees affected by a sale of its rail line, operating properties and assets as is required by the Railway Labor Act;

C. Declare that under Section 2 Seventh of the Railway Labor Act, P&LE may not complete any sale of its rail line, operating properties or assets until all Railway Labor Act dispute resolution procedures have been exhausted;

D. Enjoin P&LE from selling its rail line, operating properties or assets until it has complied fully with all of the provisions of the Railway Labor Act and all Railway Labor Act dispute resolution procedures have been exhausted;

E. Grant RLEA such other and further relief as this Court deems to be just and proper, including costs of this action.

Respectfully submitted,

/s/ Richard S. Edelman  
 William G. Mahoney  
 John O'B. Clarke, Jr.  
 William J. Birney  
 Richard S. Edelman

HIGSAW & MAHONEY, P.C.  
 Suite 210  
 1050 17th Street, N.W.  
 Washington, D.C. 20036  
 (202) 296-8500

/s/ G. R. Brewer  
 Graydon R. Brewer

GREENFIELD & MURTAGH  
 728 Fifth Avenue  
 Pittsburgh, Pennsylvania 15219  
 (412) 261-4466

*Attorneys for Plaintiff Railway  
 Labor Executives' Association*

Date: August 19, 1987

IN THE UNITED STATES DISTRICT COURT  
 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 87-1745  
 Judge Bloch

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Plaintiff,*

v.

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,  
*Defendant.*

FIRST AMENDED ANSWER

The Defendant, The Pittsburgh & Lake Erie Railroad Company ("P&LE"), by counsel, hereby answers the allegations set forth in the Complaint as follows:

1. P&LE admits that it has decided to sell its rail lines and some of its other assets, and otherwise denies the allegations set forth in Paragraph 1 of the Complaint.
2. Admitted upon information and belief.
3. Admitted upon information and belief.
4. Admitted.
5. The allegations set forth in Paragraph 5 of the Complaint require neither admission nor denial; to the extent an answer may be required, they are denied.
6. P&LE denies the allegations set forth in Paragraph 6 of the Complaint to the extent that they may imply that the district court's subject matter jurisdiction is properly invoked by the Complaint, and otherwise admits the allegations.
7. Admitted.

8. Admitted. The document attached to the Complaint as Exhibit 2 speaks for itself.

9. P&LE admits that it received the telegrams and letters attached to the Complaint as Exhibits 3a-3d, which documents speak for themselves, but lacks sufficient information to admit or deny when or for what reason the telegrams and letters were sent to P&LE.

10. The allegations of Paragraph 10 of the Complaint require neither admission nor denial. P&LE denies any violations of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*

11. Denied.

12. Denied.

13. Denied.

14. Denied.

15. Denied.

16. Denied.

Defendant P&LE denies that Plaintiff Railway Labor Executives' Association has demonstrated its entitlement to the declarative, injunctive, and other relief sought in the Complaint.

#### AFFIRMATIVE DEFENSES

As affirmative defenses, Defendant, The Pittsburgh & Lake Erie Railroad Company, asserts the following:

1. The Complaint fails to state a claim upon which relief can be granted.

2. The Court lacks subject matter jurisdiction over the allegations of the Complaint.

3. The Complaint fails to join a necessary party pursuant to Rule 19 of the Federal Rules of Civil Procedure.

4. The Plaintiff has failed to exhaust administrative remedies.

5. The Plaintiff is estopped from obtaining the relief sought in the Complaint.

6. The claims made in the Complaint are not yet ripe for adjudication.

#### VERIFIED COUNTERCLAIM FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY AND PERMANENT INJUNCTION

Defendant P&LE, hereby counterclaiming against plaintiff RLEA, alleges and says:

1. This counterclaim arises under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, which was enacted to avoid any interruption to commerce or to the operation of a rail carrier engaged therein and for other purposes. This Court has jurisdiction of this matter under 28 U.S.C. §§ 1331 and 1337. Expedited injunctive relief is appropriate under 28 U.S.C. § 1657 and Federal Rule of Civil Procedure 65.

2. Plaintiff RLEA comprises an unincorporated association of executive officers of nineteen railway labor unions. Complaint ¶ 2.<sup>1</sup> All of the fourteen unions representing P&LE employees are members of RLEA.<sup>2</sup> RLEA's mem-

<sup>1</sup> Complaint Ex. 1 inadvertently lists only 18 RLEA members, but the Brotherhood of Maintenance of Way Employees ("BMWE") is also a member.

<sup>2</sup> The following fourteen unions represent P&LE employees: United Transportation Union ("UTU"); Brotherhood of Locomotive Engineers ("BLE"); Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees ("BRAC"); American Railway & Airway Supervisors Association (Division of BRAC) ("ARASA"); American Train Dispatchers Association ("Dispatchers"); Railroad Yardmasters of America (Division of UTU) ("Yardmasters"); Brotherhood of Maintenance of Way Employees ("BMWE"); Brotherhood of Railroad

ber unions are labor "representatives" within the meaning of the RLA, 45 U.S.C. § 151, Sixth.

3. P&LE's unions have consented that RLEA acts on their behalf in this lawsuit and that they are bound, through RLEA's appearance, by the rulings and orders of this Court. See Complaint ¶¶ 2, 3, 7.

4. Defendant P&LE is a privately-held corporation incorporated in the State of Delaware with its principal place of business in Pittsburgh, Pennsylvania. P&LE operates a 182-mile railroad in western Pennsylvania and eastern Ohio, transporting coal and steel to the Great Lakes region. P&LE is a "carrier" within the meaning of the RLA, 45 U.S.C. § 151, First.

5. P&LE has entered into an agreement to sell its rail line and certain other assets to an Ohio corporation, P&LE Railco, Inc. ("Railco"). The transaction is subject to the Interstate Commerce Act ("ICA"), 49 U.S.C. 10101 *et seq.* Upon the sale, P&LE will no longer be a rail carrier.

6. P&LE has experienced severe financial difficulties as a result of the declining fortunes of the U.S. steel industry. P&LE owners believe that the opportunity to consummate the sale to Railco represents the railroad's best, and probably only, long-term chance for continued viability. The sale will thus help to ensure continued rail service and rail jobs in the area around Pittsburgh.

7. P&LE notified its employees of the anticipated sale on July 30, 1987. See Complaint Ex. 2. Within two weeks, 12 of the 14 unions representing P&LE employees con-

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Signalmen ("Signalmen"); International Association of Machinists and Aerospace Workers ("IAM"); International Brotherhood of Electrical Workers ("IBEW"); Sheet Metal Workers International Association ("Sheet Metal Workers"); International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers ("Boilermakers"); International Brotherhood of Firemen & Oilers ("Firemen"); Transport Workers Union of America ("TWU").

tended to P&LE that P&LE was required by the RLA to bargain over the sale and its effects before its consummation. Several of these unions subsequently served a formal notice to P&LE requesting bargaining pursuant to RLA Section 6, 45 U.S.C. § 156.

8. P&LE responded that it was willing to meet with the unions, but did not consider the anticipated sale to be a necessary or appropriate subject of Section 6 bargaining. A meeting has been scheduled with P&LE's unions for September 25, 1987.

9. On August 19, 1987, the RLEA initiated this action against P&LE, seeking to block the sale to Railco until P&LE has bargained with the P&LE unions over the sale and its effects.

10. The railroad industry is subject to the ICA, which vests exclusive jurisdiction over entry and exit from the railroad business in the Interstate Commerce Commission ("ICC"). The ICC can attach such conditions to railroad transactions as it finds "necessary in the public interest." 49 U.S.C. § 10901(c)(1)(A)(ii). The ICC has discretionary authority to fashion labor protective conditions to protect the interests of employees adversely affected by transactions like the anticipated sale of P&LE's rail lines. 49 U.S.C. § 10901.

11. The sale of P&LE's assets to Railco cannot be consummated until the ICC has reviewed the sale. It is believed that Railco will apply to the ICC for approval of the sale transaction on or about September 18, 1987. Rail unions and the RLEA can, and have, participated in ICC proceedings concerning the sale of rail lines.

12. Upon information and belief, at the direction of RLEA, one or more of P&LE's unions and their local and international officials, engaged in picketing of P&LE's facilities commencing the evening of September 15, 1987. The planned strike is believed to be designed for two un-

lawful purposes: (1) to retaliate against P&LE for its lawful position respecting its bargaining obligations under the RLA, and (2) to disrupt the sale transaction.

13. Unless enjoined, the strike and other picketing activity by P&LE's unions will disrupt P&LE's operations and result in their shutdown, causing irreparable injury to P&LE and injury to P&LE's shippers, its employees and the economies of the communities served by P&LE. Unless restrained, the strike could also interfere with and preclude P&LE from finalizing the sale of its assets to Railco. The uncertainty over P&LE's future will only further hamper the long-term viability of P&LE's operation.

14. Failure to grant the relief requested will cause immediate irreparable damage and loss to P&LE, to the public, to national commerce, and, ironically, to P&LE's union members themselves. Failure to grant the relief requested will cause greater damage to P&LE than the granting of such relief would cause to RLEA or P&LE's unions, for whom RLEA acts.

15. P&LE has duly complied with all requirements imposed by federal, state and local law. P&LE has not sought the relief requested herein in any other court.

#### COUNT 1

16. P&LE repeats and realleges the allegations of paragraphs 1 to 15.

17. The picketing and other action by RLEA and P&LE's unions designed to encourage P&LE's employees to withhold their services from P&LE violates the RLA, 45 U.S.C. § 151 *et seq.*

#### COUNT 2

18. P&LE repeats and realleges the allegations of paragraphs 1 to 15.

19. The picketing and other action by RLEA and P&LE's unions designed to encourage P&LE's employees to withhold their services from P&LE violates the ICA, 49 U.S.C. § 10101 *et seq.*

WHEREFORE, P&LE respectfully prays that this Court:

1. Issue a Temporary Restraining Order and a Preliminary Injunction, the same to be made permanent upon final hearing, directing and requiring RLEA, its member unions and their lodges, divisions, locals, officers, agents, employees, and representatives and all person acting in concert or participating with them, to cease and desist from authorizing, calling, causing, inducing, conducting, permitting, continuing in, or engaging in, any picketing, patrolling, self-help or disruptive behavior in any manner interfering with P&LE's operations.

2. Direct RLEA, its member unions and their lodges, divisions, locals, officers, agents, employees, and representatives and all persons acting in concert or participating with them, to issue such notices and instructions and take all other necessary steps, including intra-union discipline, to carry into effect the Orders of this Court.

3. Grant final judgment for P&LE against plaintiff prayed for herein, and provide such other and further relief in law and in equity, including costs and reasonable attorneys' fees, as the Court deems just and proper.

Respectfully submitted,

Of Counsel:

G. Edward Yurcon  
THE PITTSBURGH & LAKE  
ERIE RAILROAD COMPANY  
Suite 780 Commerce Court  
Four Station Square  
Pittsburgh, PA 15219  
(412) 261-3201

AKIN, GUMP, STRAUSS,  
HAUER & FELD  
1333 New Hampshire Ave.,  
N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 887-4000

By: /s/ Ronald M. Johnson  
 Richard L. Wyatt, Jr.  
 Ronald M. Johnson  
 Patricia A. Casey

and

SHARLOCK, REPCHECK &  
 MAHLER  
 1110 Two Chatham Center  
 Pittsburgh, PA 15219  
 (412) 391-6171

By: /s/ John J. Repcheck/RMJ  
 John J. Repcheck

Dated: September 16, 1987

#### VERIFICATION

I, Gordon E. Neuenschwander, do hereby swear and affirm that I have read the foregoing Verified Counterclaim and that the allegations set forth therein are true and correct to the best of my personal knowledge.

/s/ Gordon E. Neuenschwander  
 Gordon E. Neuenschwander  
 President  
 The Pittsburgh & Lake Erie Railroad  
 Company

Subscribed and Sworn to before  
 me this 16th day of September, 1987

/s/ Kathleen G. Cavanaugh  
 Notary Public

My Commission Expires: 9-1-1990

#### ATTACHMENT "A"

#### IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 87-1745

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Plaintiff,*

v.

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,  
*Defendant.*

#### AFFIDAVIT OF GORDON E. NEUENSCHWANDER

I, Gordon E. Neuenschwander, being duly sworn on oath, depose and state as follows:

1. I am President and Chief Executive Officer at The Pittsburgh and Lake Erie Railroad Company ("P&LE"). I have held this position since May 30, 1986. My business address is Commerce Court, Four Station Square, Pittsburgh, Pennsylvania 15219-1199.
2. The purpose of my affidavit is briefly to describe the P&LE and explain the irreparable impact of the strike or other labor unrest which threatens to shut down P&LE's operations, and the interchange of rail traffic to and from other rail carriers which connect with the P&LE.
3. The P&LE is a Class II carrier operating rail service over 182 miles of railroad running northwesterly from Brownsville and Connellsville, Pennsylvania through Pittsburgh, Pennsylvania to Youngstown, Ohio and by trackage rights over approximately 60 miles of Consolidated Rail Corporation track between Youngstown, Ohio and Ash-tabula, Ohio and over approximately 128 miles of Norfolk

Southern Corporation track between Ashtabula, Ohio and Buffalo, New York. The principal commodities that it carries are coal, iron ore, iron and steel products, and general merchandise freight.

4. The P&LE has suffered serious financial decline since 1981. Its accumulated losses in the past five years approximate 60 million dollars. The P&LE traffic has declined as a result of deregulation and the erosion of the basic steel and manufacturing industries it was designed to serve, in keeping with the general decline of the economy.

5. The P&LE has taken several steps to reverse its fortunes and insure its long term viability. Recently, it attempted to expand its route system and traffic base in connection with the proposed sale of Conrail to Norfolk Southern Corporation. However, Congress ultimately decided to leave Conrail independent, thereby foreclosing this opportunity.

6. On July 8, 1987, the P&LE entered into an agreement dated as of June 1, 1987 to sell certain of its assets, including its rail lines and operating properties to P&LE Railco, Inc., (Railco), a subsidiary of the Chicago West Pullman Transportation Corporation. The sale has not been completed. Railco has yet to file with the I.C.C. The sale of P&LE's lines to a new company, willing to invest new resources in its operations, is regarded as its last and only chance for long term viability and the preservation of any rail employment on the P&LE.

7. As described in the affidavit of Mr. James D. Peters, various P&LE unions are striking P&LE, because of the sale of P&LE's rail assets. The strike has interrupted P&LE's operations and will have an inescapable and irreparable impact upon P&LE, its chances of survival in any form, P&LE's employees, and the shippers and communities who utilize the P&LE within a short period of time.

8. The P&LE serves over thirty industries and handles approximately 75,000 cars of freight per year. The P&LE carries coal for electric generating plants, iron and steel products and general merchandise traffic. The P&LE, under current operating conditions, earns on average daily operating revenues of about \$93,000.00. The curtailment of P&LE's operations by labor unrest will cause these revenues to be permanently lost to P&LE.

9. The P&LE also interchanges freight with thirteen connecting carriers, including the Monongahela Railway Company, Consolidated Rail Corporation and CSX Transportation (which includes the former Baltimore and Ohio Railroad and Chesapeake and Ohio Railway), the Norfolk Southern Corporation and the Delaware and Hudson Railway Company. Interruption of P&LE's operations will affect the operations of these connecting carriers and impair the interchange of traffic in interstate commerce.

10. Interruption of P&LE's operations will further have a ripple effect throughout the areas it serves and beyond by disrupting the operations of the industries it serves directly or indirectly. Disruption of those industries could result in the furlough of their employees.

11. Some freight which normally moves over the P&LE will switch to other transportation alternatives or to other rail carriers which jointly serve points common to them and P&LE. If this diversion becomes permanent, the P&LE's financial position would be even further weakened and could result in its discontinuance of rail service.

12. A strike will damage P&LE's ability to follow through on the sale of its assets to P&LE Railco. If this sale is not consummated, it is unlikely that the P&LE could find another buyer willing to agree to the same terms and conditions of sale.

13. For all of these reasons, an interruption of P&LE's operations will have a devastating effect upon P&LE.

/s/ Gordon E. Neuenschwander  
Gordon E. Neuenschwander

Sworn and Subscribed to this 10th Day of September 1987.

/s/ Kathleen G. Cavanaugh  
Notary Public

My Commission Expires: 9-1-1990

ATTACHMENT "B"

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

\_\_\_\_\_  
**Civil Action No. 87-1745**  
\_\_\_\_\_

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Plaintiff,*

v.

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,  
*Defendant.*

**AFFIDAVIT OF JAMES D. PETERS**

I, James D. Peters, being duly sworn on oath, depose and state as follows:

1. I am Director, Labor Relations, for The Pittsburgh and Lake Erie Railroad Company ("P&LE"). I have held this position since March 1, 1983. My duties include responsibility for all labor relations matters of the P&LE, and I administer P&LE's collective bargaining agreements with its fourteen unions.
2. P&LE is a common carrier by rail and has a legal responsibility to provide uninterrupted and prompt transportation service at points along its line.
3. The Railway Labor Executives' Association (R.E.L.A.) is an unincorporated association of the chief executive officers of nineteen (19) labor organizations which collectively represent all of the P&LE's organized employees and most of the organized employees of the other railroads in the United States.
4. On July 30, 1987, the P&LE informed its labor representatives of the proposed sale of all of its rail lines and

operating properties to a subsidiary of the Chicago West Pullman Transportation Corporation. A copy of the letter of Gordon E. Neuenschwander, President and Chief Executive Officer of the P&LE, mailed to all employees on July 31, 1987 was included with the notice to the labor representatives. A copy of our July 30, 1987 letter is attached as Exhibit No. 1.

5. Under various dates commencing on August 7, 1987, the labor organizations communicated with P&LE's President and Chief Executive Officer, Gordon E. Neuenschwander, requesting a meeting to discuss the proposed sale and asking for certain specific information relating thereto. Copies of the communications received from the labor organizations are attached as Exhibit Nos. 2(a) through 2(j).

6. Under date of August 10, 1987, P&LE advised the organizations that it had their requests under consideration and would respond within a week. A copy of Mr. Neuenschwander's letter is attached as Exhibit No. 3(a) through 3(j).

7. On August 17, 1987, Mr. Neuenschwander further advised the labor representatives that we were prepared to meet with them with regard to this matter in early September. A copy of Mr. Neuenschwander's letter is attached as Exhibit No. 4(a) through 4(k).

8. Under date of August 19, 1987, the Railway Labor Executives' Association filed its complaint in the U. S. District Court for the Western District of Pennsylvania, initiating this action, wherein it requested declaratory and injunctive relief alleging that P&LE was in violation of the Railway Labor Act for failing to negotiate with the organizations prior to signing the sales agreement.

9. The labor organizations served separate but similar Section 6 Notices starting on August 14, 1987 requesting that Carrier meet with the organizations collectively to discuss their proposals. Copies of the Notices are attached as Exhibit Nos. 5(a) through 5(i).

10. P&LE responded to the Section 6 Notices and suggested a meeting date to discuss said Notices. Copy of our responses are attached as Exhibit Nos. 6(a) through 6(i).

11. Although two labor organizations accepted the meeting date, the majority of the organizations advised that the September 25, 1987 suggested date was too late and requested an earlier date. In addition, the Brotherhood of Maintenance of Way Employees who were separately scheduled to meet on September 11, 1987 agreed to waive that meeting and meet jointly with the other organizations on September 25, 1987. Copies of these communications are attached as Exhibit Nos. 7(a) through 7(h).

12. On September 14, 1987, P&LE advised the labor organizations that protested the September 25th date that an earlier date could not be scheduled and reconfirmed the September 25, 1987 date including the time and precise location of meeting. Copies of Mr. Neuenschwander's letters are attached as Exhibit Nos. 8(a) through 8(g).

13. One additional Organization served a Section 6 Notice dated September 8, 1987 which was received on September 15, 1987 and has not been answered as of this date. Copy of this Notice is attached as Exhibit No. 9.

14. At approximately 9:00 P. M. on September 15, 1987 pickets started to appear at various locations on Carrier's property bearing signs stating:

"Transportation Communications  
International Union  
TCU-AFL-CIO On Strike."

15. Certain clerical employees that were on duty were called or personally advised that the Carrier was being struck and they should leave the property, which they did.

16. Subsequently pickets appeared bearing signs stating:

RLEA  
TWU On Strike  
Against The P&LE

17. P&LE has been and is in full compliance with all of its labor agreements, the R.L.E.A. There is no dispute between the P&LE and any of its representative labor organizations in which the resolution procedures provided for in the Railway Labor Act have been exhausted.

18. As a result of the before mentioned picketing, there is an interruption of P&LE operations and its employees have failed to report for their designated assignments. P&LE's transportation of freight to and from its many customers and as an overhead carrier is greatly impaired and is threatened with cessation.

19. Unless a temporary restraining order is issued pending the hearing of this case, the P&LE's operations will continue to be interrupted so that immediate, substantial and irreparable injury, loss and damage will continue to result to P&LE and its shipping public. In contrast, R.L.E.A. will not suffer any damages as a result of the entry of a temporary restraining order.

/s/ J. D. Peters  
J. D. Peters

Sworn to and subscribed before me, a Notary Public in and for the County of Allegheny, Pa., this 16th day of September, 1987.

/s/ Kathleen G. Cavanaugh  
Notary Public

My Commission Expires: 9-1-1990

**THE PITTSBURGH & LAKE ERIE  
RAILROAD COMPANY**

July 31, 1987

Dear P&LE Employee:

By now you have undoubtedly heard numerous rumors concerning the possible sale of the P&LE Railroad, and you have probably read the article in the business section of Tuesday's Pittsburgh Press which highlights that possibility. While no sale of the P&LE has been completed, I do wish to advise, however, that an agreement has now been reached with a subsidiary of Chicago West Pullman Transportation Corporation which, when finalized, would result in its purchase of all the P&LE's rail lines and operating properties. The transaction would also include the purchase of a substantial number of freight cars and all the P&LE's operating locomotives.

There are a number of contingencies which remain before such a sale could be completed, and you will be provided with further details concerning the proposed transaction as additional information becomes available.

The transaction was negotiated in an effort to insure continued rail operations in the face of mounting financial pressures and continuing operating losses. Based on our discussions, I sincerely believe that the new company's plans for operating the P&LE provide the most realistic alternative for preserving competitive rail service for our customers for years to come.

All of you in the P&LE family have worked hard and sacrificed over the past few years to keep the railroad operating under the most severe financial conditions. In addition, many of the labor organizations have entered into helpful concessionary agreements. However, in spite of these meaningful efforts, a permanent solution to the company's financial condition has not been achieved. After

much consideration, it is clear to me that the proposed sale provides the best opportunity for continued railroad operations.

Sincerely yours,

/s/ Gordon E. Neuenschwander  
Gordon E. Neuenschwander

**THE AMERICAN RAILWAY AND AIRWAY  
SUPERVISORS ASSOCIATION**

**A Division of BRAC-AFL-CIO-CLC-RLEA**

August 7, 1987

Gordon E. Neuenschwander  
President  
Pittsburgh & Lake Erie Railway Company  
Commerce Court  
4 Station Square  
Pittsburgh, PA 15219

Dear Mr. Neuenschwander:

You have advised Pittsburgh & Lake Erie employees that P & LE intends to sell its rail lines, operating properties, and much of its other assets to a subsidiary of the Chicago West Pullman Transportation Corporation, providing that certain contingencies are satisfied. You have not identified the name of the Chicago West Pullman subsidiary involved. Nor have you provided either the employees or this organization with any information regarding the contingencies which must be satisfied, an expected date for consummation, or anticipated effects upon employees.

Obviously, such a change in ownership will have a significant impact on the working conditions of the P & LE employees represented by this organization, however, to date this organization has not received a Section 6 notice under the Railway Labor Act regarding this transaction. It is the position of this organization that any consummation of this transaction without negotiations pursuant to the Railway Labor Act will be a violation of that statute. In that regard, this organization is prepared to meet with the P & LE to negotiate concerning all aspects of this matter including, but not limited to, the decision to sell the rail lines and other assets of the P & LE and the

effects of such a transaction on P & LE's employees who are represented by this organization. Additionally, we request that you furnish this organization with all information available regarding this transaction including, but not limited to, the contingencies which must yet be satisfied, what filings will be made with the ICC, the expected date for consummation, and anticipated effects on employees.

Sincerely,

/s/ Frank Ferlin, Jr.

Frank Ferlin, Jr.

President, ARASA Division/BRAC

FF/kka

cc: L. D. Marion, GC  
J. C. Shaw, GC

THE PITTSBURGH & LAKE ERIE  
RAILROAD COMPANY

August 17, 1987

Mr. Alex J. Sarcone, General Chairman  
International Association of Machinists  
and Aerospace Workers  
2326 Lucina Avenue  
Pittsburgh, PA 15210

Dear Mr. Sarcone:

In response to your August 13, 1987 telegram, in which you suggested that we meet to discuss the anticipated sale of Pittsburgh & Lake Erie rail lines and its effects on employees represented by your organization, please be advised that the P&LE is prepared to meet with you in early September with regard to this matter, and will advise you of the precise time and location as soon as the arrangements are complete.

We propose this meeting in the interests of keeping employees informed of plans for the P&LE's future, without prejudice to our position that "Section 6" bargaining under the Railway Labor Act is not necessary or appropriate in this instance. Your telegram does not constitute a Section 6 notice, nor should this response be viewed as an agreement to confer pursuant to that section of the statute. The anticipated transaction is controlled by the Interstate Commerce Act and is subject to the authority of the Interstate Commerce Commission. Section 6 bargaining, in the railroad's view, would usurp the ICC's authority over the transaction and management's prerogative to conduct the railroad's business as it sees fit.

With regard to your information requests, I expect that to the extent possible at present, your questions will be answered at our meeting.

Sincerely,

/s/ Gordon E. Neuenschwander  
Gordon E. Neuenschwander

**BROTHERHOOD OF MAINTENANCE  
OF WAY EMPLOYEES**

August 14, 1987

Mr. James D. Peters  
Director, Labor Relations  
Pittsburgh & Lake Erie Railroad Co.  
Suite 780, Commerce Court Building  
Four Station Square  
Pittsburgh, PA 15219

Dear Mr. Peters:

This letter serves as formal notice under Section 6 of the Railway Labor Act, as amended, to negotiate with the Pittsburgh & Lake Erie Railroad an agreement to ameliorate to the maximum extent possible the adverse impacts which the proposed sale of rail lines, operating properties and other assets will have on employees which this Organization represents.

Specifically, the Agreement which the Organization desires to negotiate would include provisions in Appendix A and B, attached hereto.

In accordance with Section 6 of the Railway Labor Act, we suggest that representatives of the Pittsburgh & Lake Erie Railroad meet with representatives of the Organization at 10 a.m., on Tuesday, September 1, 1987 at a mutual agreeable location in Pittsburgh. Please contact the undersigned to arrange the time and place of the conference.

With best wishes, I am

Very truly yours,

/s/ James P. Cassese

**THE AMERICAN RAILWAY AND AIRWAY  
SUPERVISORS ASSOCIATION  
A Division of BRAC-AFL-CIO-CLC-RLEA**

August 26, 1987

Mr. Gordon E. Neuenschwander, President  
Pittsburgh & Lake Erie Railway Company  
Commerce Court  
4 Station Square  
Pittsburgh, Pennsylvania 15219

Dear Mr. Neuenschwander:

In response to your notices to P & LE employees regarding the proposed sale of the P & LE's rail lines, operating properties and certain other assets, this Organization has advised you that it is our position that such a transaction cannot be effected without compliance with provisions of the Railway Labor Act regarding notice, negotiations and maintenance of the status quo pending completion of Railway Labor Act procedures. Additionally, we requested that you provide this Organization with information relating to this transaction.

The proposed sale will obviously affect the working conditions of P & LE employees so in the interest of expediting negotiations, but without prejudice to our position that P & LE had an obligation to serve its own Section 6 notice before entering any agreement for the sale of its rail line and other assets, please consider this letter a Section 6 notice; our proposals are contained in the attachment to this letter. This Organization intends to coordinate its bargaining in this manner with the other Organizations on the property and proposes that a meeting between P & LE and all of the Organizations be held on September 8, 1987; at a mutually agreeable location in Pittsburgh, Pennsylvania.

You have proposed a meeting in early September "in the interests of keeping employees informed of plans for P & LE's future". We are amenable to such a meeting without prejudice to this Organization's position regarding P & LE's obligations under the Railway Labor Act, and suggest that such a meeting be held concurrent with the initial meeting we have proposed for negotiations regarding our proposals.

In order to facilitate our discussions we again request that, in advance of our meeting, you provide us with information regarding this transaction; including, but not limited to, contingencies which must yet be satisfied for the proposed sale to be completed, what filings will be made with the ICC, the expected date for consummation, anticipated effects on employees, the terms of the proposed sale, the process by which purchasers were solicited and the identity of any individual or entity who or which is providing financing for this transaction.

Sincerely,

/s/ Frank Ferlin, Jr.  
Frank Ferlin, Jr.

President, ARASA Division/BRAC

FF/kka

cc: L. D. Marion, GC  
J. C. Shaw, GC

## ATTACHMENT

1. No employee of the P&LE Railroad Company who performed compensated service at any time between August 1, 1986 and August 1, 1987 or who was on an authorized leave of absence during that time period, who is represented by this organization shall be deprived of employment or placed in a worse position with respect to compensation or working conditions for any reason except resignation, retirement, death or dismissal for justifiable cause. Failure to relocate shall not be considered as justifiable cause for loss of benefits under this Agreement. The formulae for the protective allowances, with a separation option, shall be comparable to those established in the *New York Dock* conditions.
2. If an employee is placed in a worse position with respect to compensation or working conditions, that employee shall receive, in addition to a make-whole-remedy, penalty pay equal to three times the lost pay, fringe benefits and consequential damages suffered by such employee.
3. P&LE agrees to obtain binding commitments from any purchaser of its rail line operating properties and assets to assume all collective bargaining agreements (including this Agreement) with, and obligations to, P&LE employees who are represented by this Organization to hire P&LE employees in seniority order without physicals, and to negotiate with the P&LE and this Organization an agreement to apply this Agreement to the sale transactions and to select the forces to perform the work over the lines being acquired.
4. Any dispute or controversy over the application or interpretation of this Agreement shall be handled on the property in a expedited manner and may be referred by the employee or this Organization for ad-

justment in accordance with Section 3, Second of the Railway Labor Act to a Special Board of Adjustment to be established by the Agreement.

## BROTHERHOOD OF RAILROAD SIGNALMEN

R. T. Bates, President

August 26, 1987

Mr. Gordon E. Neuenschwander, President  
 Pittsburgh & Lake Erie Railway Company  
 Commerce Court  
 4 Station Square  
 Pittsburgh, Pennsylvania 15219

Dear Mr. Neuenschwander:

In response to your notices to P&LE employee regarding the proposed sale of the P&LE's rail lines, operating properties and certain other assets, this Organization has advised you that it is our position that such a transaction cannot be effected without compliance with provisions of the Railway Labor Act regarding notice, negotiations and maintenance of the status quo pending completion of Railway Labor Act procedures. Additionally, we requested that you provide this Organization with information relating to this transaction.

The proposed sale will obviously affect the working conditions of P&LE employees so in the interest of expediting negotiations, but without prejudice to our position that P&LE had an obligation to serve its own Section 6 notice before entering any agreement for the sale of its rail line and other assets, please consider this letter a Section 6 notice; our proposals are contained in the attachment to this letter. This Organization intends to coordinate its bargaining in this manner with the other Organizations on the property and proposes that a meeting between P&LE and all of the Organizations be held on September 8, 1987, at a mutually agreeable location in Pittsburgh, Pennsylvania.

You have proposed a meeting in early September "in the interests of keeping employees informed of plans for

P&LE's future." We are amenable to such a meeting without prejudice to this Organization's position regarding P&LE's obligations under the Railway Labor Act, and suggest that such a meeting be held concurrent with the initial meeting we have proposed for negotiations regarding our proposals.

In order to facilitate our discussions we again request that, in advance of our meeting, you provide us with information regarding this transaction; including, but not limited to, contingencies which must yet be satisfied for the proposed sale to be completed. what filings will be made with the ICC, the expected date for consummation, anticipated effects on employees, the terms of the proposed sale, the process by which purchasers were solicited and the identity of any individual or entity who or which is providing financing for this transaction.

Sincerely,

/s/ R.T. Bates  
 President

RTB/jdg  
 Encl.

cc: W. B. Harvell, VP  
 W. D. Pickett, VP  
 C. T. Green, GC

## ATTACHMENT

1. No employee of the P&LE Railroad Company who performed compensated service at any time between August 1, 1986 and August 1, 1987 or who was on an authorized leave of absence during that time period, who is represented by this Organization shall be deprived of employment or placed in a worse position with respect to compensation or working conditions for any reason except resignation, retirement, death or dismissal for justifiable cause. Failure to relocate shall not be considered as justifiable cause for loss of benefits under this Agreement. The formulae for the protective allowances, with a separation option, shall be comparable to those established in the *New York Dock* conditions.
2. If an employee is placed in a worse position with respect to compensation or working conditions, that employee shall receive, in addition to a make-whole-remedy, penalty pay equal to three times the lost pay, fringe benefits and consequential damages suffered by such employee.
3. P&LE agrees to obtain binding commitments from any purchaser of its rail line operating properties and assets to assume all collective bargaining agreements (including this Agreement) with, and obligations to P&LE employees who are represented by this Organization to hire P&LE employees in seniority order without physicals, and to negotiate with the P&LE and this Organization an agreement to apply this Agreement to the sale transaction and to select the forces to perform the work over the lines being acquired.
4. Any dispute or controversy over the application or interpretation of this Agreement shall be handled on the property in an expedited manner and may be referred by the employee or this Organization for adjustment in accordance with Section 3, Second of the

Railway Labor Act to a Special Board of Adjustment to be established by the Agreement.

## AMERICAN TRAIN DISPATCHER ASSOCIATION

August 27, 1987

Mr. Gordon E. Neuenschwander, President  
Pittsburgh & Lake Erie Railroad Company  
Commerce Court - 4 Station Square  
Pittsburgh, Pennsylvania 15219

Mr. James D. Peters  
Director-Labor Relations  
P&LE Railroad Company  
4 Station Square - Commerce Court, Suite 780  
Pittsburgh, Pennsylvania 15219-1199

Gentlemen:

In response to your notices to P&LE employees regarding the proposed sale of the P&LE's rail lines, operating properties and certain other assets, this Organization has advised you that it is our position that such a transaction cannot be effected without compliance with provisions of the Railway Labor Act regarding notice, negotiations and maintenance of the status quo pending completion of Railway Labor Act procedures. Additionally, we requested that you provide this Organization with information relating to this transaction.

The proposed sale will obviously affect the working conditions of P&LE employees so in the interest of expediting negotiations, but without prejudice to our position that P&LE had an obligation to serve its own Section 6 notice before entering any agreement for the sale of its rail line and other assets, please consider this letter a Section 6 notice; our proposals are contained in the attachment to this letter. This Organization intends to coordinate its bargaining in this manner with the other Organizations on the property and proposes that a meeting between P&LE and all of the Organizations be held on September 8, 1987;

at a mutually agreeable location in Pittsburgh, Pennsylvania.

You have proposed a meeting in early September "in the interests of keeping employees informed of plans for P&LE's future". We are amenable to such a meeting without prejudice to this Organization's position regarding P&LE's obligations under the Railway Labor Act, and suggest that such a meeting be held concurrent with the initial meeting we have proposed for negotiations regarding our proposals.

In order to facilitate our discussions we again request that, in advance of our meeting, you provide us with information regarding this transaction; including, but not limited to, contingencies which must yet be satisfied for the proposed sale to be completed, what filings will be made with the ICC, the expected date for consummation, anticipated effects on employees, the terms of the proposed sale, the process by which purchasers were solicited and the identity of any individual or entity who or which is providing financing for this transaction.

Sincerely your,

/s/ R. J. Irvin  
R. J. Irvin  
President

RJI:cc

Attachment

cc: Mr. W. A. Clifford  
Mr. J. J. O'Farrell

## ATTACHMENT

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justment in accordance with Section 3, Second of the Railway Labor Act to a Special Board of Adjustment to be established by the Agreement.

**SHEET METAL WORKERS' INTERNATIONAL  
ASSOCIATION**

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

August 27, 1987

Mr. Gordon E. Neuenschwander, President  
Pittsburgh & Lake Erie Railway Company  
Commerce Court  
4 Station Square  
Pittsburgh, Pennsylvania 15219

Dear Mr. Neuenschwander:

In response to your notices to P&LE employees regarding the proposed sale of the P&LE's rail lines, operating properties and certain other assets, this Organization has advised you that it is our position that such a transaction cannot be effected without compliance with provisions of the Railway Labor Act regarding notice, negotiations and maintenance of the status quo pending completion of Railway Labor Act procedures. Additionally, we requested that you provide this Organization with information relating to this transaction.

The proposed sale will obviously affect the working conditions of P&LE employees so in the interest of expediting negotiations, but without prejudice to our position that P&LE had an obligation to serve its own Section 6 notice before entering any agreement for the sale of its rail line and other assets, please consider this letter a Section 6 notice; our proposals are contained in the attachment to this letter. This Organization intends to coordinate its bargaining in this manner with the other Organizations on the property and proposes that a meeting between P&LE and all of the Organizations be held on September 8, 1987; at a mutually agreeable location in Pittsburgh, Pennsylvania.

August 27, 1987  
Page 2

You have proposed a meeting in early September "in the interests of keeping employees informed of plans for P&LE's future". We are amenable to such a meeting without prejudice to this Organization's position regarding P&LE's obligations under the Railway Labor Act, and suggest that such a meeting be held concurrent with the initial meeting we have proposed for negotiations regarding our proposals.

In order to facilitate our discussions we again request that, in advance of our meeting, you provide us with information regarding this transaction; including, but not limited to, contingencies which must yet be satisfied for the proposed sale to be completed, what filings will be made with the ICC, the expected date for consummation, anticipated effects on employees, the terms of the proposed sale, the process by which purchasers were solicited and the identity of any individual or entity who or which is providing financing for this transaction.

Sincerely yours,

/s/ Don C. Buchanan  
Don C. Buchanan  
Director of Railroad Workers

/s/ Audrey R. Hicks  
Audrey R. Hicks  
General Chairman

DCB/gt  
Attachment

## ATTACHMENT

1. No employee of the P&LE Railroad Company who performed compensated service at any time between August 1, 1986 and August 1, 1987 or who was on an authorized leave of absence during that time period, who is represented by this organization shall be deprived of employment or placed in a worse position with respect to compensation or working conditions for any reason except resignation, retirement, death or dismissal for justifiable cause. Failure to relocate shall not be considered as justifiable cause for loss of benefits under this Agreement. The formulae for the protective allowances, with a separation option, shall be comparable to those established in the *New York Dock* conditions.
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justment in accordance with Section 3, Second of the Railway Labor Act to a Special Board of Adjustment to be established by the Agreement.

**INTERNATIONAL BROTHERHOOD  
ELECTRICAL WORKERS**

CERTIFIED MAIL

August 28, 1987

P 681 174 375

RETURN RECEIPT REQUESTED

Mr. Gordon E. Neuenschwander, President  
Pittsburgh & Lake Erie Railway Company  
Commerce Court  
4 Station Square  
Pittsburgh, PA 15219

Dear Mr. Neuenschwander:

In response to your notices to P&LE employees regarding the proposed sale of the P&LE's rail lines, operating properties and certain other assets, this Organization has advised you that it is our position that such a transaction cannot be effected without compliance with provisions of the Railway Labor Act regarding notice, negotiations and maintenance of the status quo pending completion of Railway Labor Act procedures. Additionally, we requested that you provide this Organization with information relating to this transaction.

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Sincerely,

/s/ Peter A. Puglia

Peter A. Puglia

General Chairman

System Council No. 7, IBEW

PAP:df

Enclosure

## ATTACHMENT

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Railway Labor Act to a Special Board of Adjustment to be established by the Agreement.

**BROTHERHOOD OF RAILWAY, AIRLINE AND  
STEAMSHIP CLERKS**

File: 73.0 P&LE (1)

Subject: Sale of the P&LE Railroad/  
Section 6 Notice

August 31, 1987

**FEDERAL EXPREESS MAIL**

Mr. Gordon E. Neuenschwander, President  
Pittsburgh & Lake Erie Railway Company  
Commerce Court  
4 Station Square  
Pittsburgh, PA 15219

Dear Mr. Neuenschwander:

In response to your notice to P&LE employees regarding the proposed sale of the P&LE's rail lines, operating properties and certain other assets, this Organization has advised you that it is our position that such a transaction cannot be effected without compliance with provisions of the Railway Labor Act regarding notice, negotiations and maintenance of the status quo pending completion of Railway Labor Act procedures. Additionally, we requested that you provide this Organization with information relating to this transaction.

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all of the Organizations be held on September 8, 1987; at a mutually agreeable location in Pittsburgh, Pennsylvania.

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Very truly yours

/s/ R.A. Scardelletti  
Robert A. Scardelletti  
General Chairman

RAS/pg

Attachment

cc: R. I. Kilroy, IP  
M. M. Kraus, General Counsel  
W. G. Mahoney, Esquire  
N. W. Randolph, Jr., EVGC  
R. C. Yanssens, VGC  
P. A. Ranalli, DC  
J. F. Lint, LPC 1283

## ATTACHMENT

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justment in accordance with Section 3, Second of the Railway Labor Act to a Special Board of Adjustment to be established by the Agreement.

INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS  
District Twenty-Two

CERTIFIED MAIL

September 1, 1987

Mr. Gordon E. Neuenschwander, President  
Pittsburgh & Lake Erie Railway Company  
Commerce Court  
4 Station Square  
Pittsburgh, PA 15219

Dear Mr. Neuenschwander:

In response to your notices to Pittsburgh and Lake Erie Railway employees regarding the proposed sale of the P&LE's rail lines, operating properties, and certain other assets, this Organization has advised you that it is our position that such a transaction cannot be effected without compliance with provisions of the Railway Labor Act regarding notice, negotiations, and maintenance of the status quo pending completion of Railway Labor Act procedures. Additionally, we requested that you provide this Organization with information relating to this transaction.

The proposed sale will obviously affect the working conditions of P&LE employees so in the interest of expediting negotiations, but without prejudice to our position that P&LE had an obligation to serve its own Section 6 notice before entering any agreement for the sale of its rail line and other assets, please consider this letter a Section 6 notice; our proposals are contained in the attachment to this letter. This Organization intends to coordinate its bargaining in this manner with the other Organizations on the property and proposes that a meeting between P&LE and all of the Organizations be held on September 8, 1987, at a mutually agreeable location in Pittsburgh, Pennsylvania.

You have proposed a meeting in early September "in the interest of keeping employees informed of plans for P&LE's future." We are amenable to such a meeting without prejudice to this Organization's position regarding P&LE's obligations under the Railway Labor Act, and suggest that such a meeting be held concurrent with the initial meeting we have proposed for negotiations regarding our proposals.

In order to facilitate our discussions, we again request that in advance of our meeting, you provide us with information regarding this transaction, including, but not limited to, contingencies which must yet be satisfied for the proposed sale to be completed, what filings will be made with the ICC, the expected date for consummation, anticipated effects on employees, the terms of the proposed sale, the process by which purchasers were solicited and the identity of any individual or entity who or which is providing financing for this transaction.

Very truly yours,

/s/ Alex Sarcone  
Alex Sarcone,  
General Chairman

sq -  
Enclosure

cc: Messrs. J. E. Burns, Jr.,  
President, Dir. Gen. Chrmn.  
W. D. Snell,  
Asst. Pres. Dir. Gen. Chrman.  
R. J. McCarthy,  
Railroad Coordinator  
A. J. Takacs,  
Local Chairman LL-1161

## ATTACHMENT

1. No employee of the P&LE Railroad Company who performed compensated service at any time between August 1, 1986 and August 1, 1987 or who was on an authorized leave of absence during that time period, who is represented by this organization shall be deprived of employment or placed in a worse position with respect to compensation or working conditions for any reason except resignation, retirement, death or dismissal for justifiable cause. Failure to relocate shall not be considered as justifiable cause for loss of benefits under this Agreement. The formulae for the protective allowances, with a separation option, shall be comparable to those established in the *New York Dock* conditions.
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justment in accordance with Section 3, Second of the Railway Labor Act to a Special Board of Adjustment to be established by the Agreement.

**INTERNATIONAL BROTHERHOOD OF  
FIREMEN AND OILERS**

September 3, 1987

Mr. Gordon E. Neuenschwander, President  
Pittsburgh & Lake Erie Railway Company  
Commerce Court  
4 Station Square  
Pittsburgh, Pennsylvania 15219

Dear Mr. Neuenschwander:

In response to your notices to P&LE employees regarding the proposed sale of the P&LE's rail lines, operating properties and certain other assets, this Organization has advised you that it is our position that such a transaction cannot be effected without compliance with provisions of the Railway Labor Act regarding notice, negotiations and maintenance of the status quo pending completion of Railway Labor Act procedures. Additionally, we requested that you provide this Organization with information relating to this transaction.

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You have proposed a meeting in early September "in the interests of keeping employees informed of plans for

P&LE's future". We are amenable to such a meeting without prejudice to this Organization's position regarding P&LE's obligations under the Railway Labor Act, and suggest that such a meeting be held concurrent with the initial meeting we have proposed for negotiations regarding our proposals.

In order to facilitate our discussions we again request that, in advance of our meeting, you provide us with information regarding this transaction; including, but not limited to, contingencies which must yet be satisfied for the proposed sale to be completed, what filings will be made with the ICC, the expected date for consummation, anticipated effects on employees, the terms of the proposed sale, the process by which purchasers were solicited and the identity of any individual or entity who or which is providing financing for this transaction.

Sincerely,

/s/ G. J. Francisco, Jr.  
G. J. Francisco, Jr.  
General Chairman and  
International Vice President

GJFJr/ab  
Attachment

CERTIFIED MAIL NO. P 094 506 928  
RETURN RECEIPT REQUESTED

## ATTACHMENT

1. No employee of the P&LE Railroad Company who performed compensated service at any time between August 1, 1986 and August 1, 1987 or who was on an authorized leave of absence during that time period, who is represented by this organization shall be deprived of employment or placed in a worse position with respect to compensation or working conditions for any reason except resignation, retirement, death or dismissal for justifiable cause. Failure to relocate shall not be considered as justifiable cause for loss of benefits under this Agreement. The formulae for the protective allowances, with a separation option, shall be comparable to those established in the *New York Dock* conditions.
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Railway Labor Act to a Special Board of Adjustment to be established by the Agreement.

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 87-1745

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Plaintiff,*

v

PITTSBURGH & LAKE ERIE RAILROAD CO.,  
*Defendant.*

DECLARATION OF ROBERT A. SCARDELLETTI

ROBERT A. SCARDELLETTI, deposes and states under penalty of perjury, pursuant to 28 United States Code, Section 1746, that the following is true and correct:

1. Declarant is, and has been since September 1, 1987, a Vice President of the Transportation Communications International Union (TCU), which was formerly the Brotherhood of Railway and Airline Clerks (BRAC). Also, Declarant has been, since May 24, 1984, BRAC's General Chairman, with the responsibility to handle the day to day representation matters of employees of the Pittsburgh and Lake Erie Railroad, (hereinafter "P&LE"), as well as other railroads in the Eastern portion of this country. In the course of performing his duties, Declarant sent and received documents, true and accurate copies of which are attached hereto.
2. The documents which Declarant authenticates are as follows:
  - (a) Cover letter from P&LE Labor Relations to Declarant attaching the July 31, 1987

letter from the P&LE's President to all P&LE employees;

- (b) August 7, 1987 letter by Declarant to P&LE's President;
- (c) August 10, 1987 response of P&LE's President to letter (b);
- (d) August 17, 1987 letter to Declarant from P&LE's President in further response to letter (b);
- (e) Section 6 Notice by BRAC to P&LE, dated August 31, 1987;
- (f) Letter dated September 1, 1987 by P&LE in response to Section 6 Notice; and
- (g) Telegram from Declarant to P&LE President sent September 4, 1987, to which no response has been received.

I DECLARE UNDER PENALTY OF PERJURY THAT  
THE FOREGOING IS TRUE AND CORRECT.

Executed on this 16th day of September, 1987.

/s/ Robert A. Scardelletti  
Robert A. Scardelletti

**THE PITTSBURGH & LAKE ERIE  
RAILROAD COMPANY**

July 30, 1987

Mr. R. A. Scardelletti, General Chairman  
Brotherhood of Railway, Airline & Steamship Clerks,  
Freight Handlers, Express & Station Employees  
1522 Locust Street  
Philadelphia, PA 19102

Dear Mr. Scardelletti:

This office has received numerous inquiries concerning the possible sale of the P&LE, and, as you are aware, there have been several newspaper and television items on the subject. We can now advise you that an agreement has been reached with a subsidiary of Chicago West Pullman Transportation Corporation which will result in their purchase of all of the P&LE's rail lines and operating properties, providing all of the contingencies upon which the agreement is premised are satisfied.

Enclosed is a copy of Mr. Neuenschwander's letter which will be mailed to all employees on July 31, 1987.

You will be provided with additional information concerning the transaction as it develops.

We recognize and appreciate the cooperation that you gentlemen and your constituents have displayed, but in spite of these meaningful efforts we are still faced with continued operating losses and increasing financial pressures. After very serious consideration by top management, it was decided that the proposed sale provided the best solution to the dilemma.

Yours very truly,

/s/ James D. Peters

**BROTHERHOOD OF RAILWAY,  
AIRLINE AND STEAMSHIP CLERKS**

File: 10 P&LE (1)

Subject: Sale of the P&LE Railroad  
August 7, 1987

**FEDERAL EXPRESS MAIL**

Mr. Gordon E. Neuenschwander  
President  
Pittsburgh & Lake Erie Railway Company  
Commerce Court  
4 Station Square  
Pittsburgh, PA 15219

Dear Mr. Neuenschwander:

You have advised Pittsburgh & Lake Erie employees that P&LE intends to sell its rail lines, operating properties, and much of its other assets to a subsidiary of the Chicago West Pullman Transportation Corporation, providing that certain contingencies are satisfied. You have not identified the name of the Chicago West Pullman subsidiary involved. Nor have you provided either the employees of this organization with any information regarding the contingencies which must be satisfied, an expected date for consummation, or anticipated effects upon employees.

Obviously, such a change in ownership will have a significant impact on the working conditions of the P&LE employees represented by this organization, however, to date this organization has not received a Section 6 notice under the Railway Labor Act regarding this transaction. It is the position of this organization that any consummation of this transaction without negotiations pursuant to the Railway Labor Act will be a violation of that statute. In that regard, this organization is prepared to meet with the P&LE to negotiate concerning all aspects of this mat-

ter including, but not limited to, the decision to sell the rail lines and other assets of the P&LE and the effects of such a transaction on P&LE's employees who are represented by this organization. Additionally, we request that you furnish this organization with all information available regarding this transaction including, but not limited to, the contingencies which must yet be satisfied, what filings will be made with the ICC, the expected date for consummation, and anticipated effects on employees.

This matter is of utmost urgency, and we would expect your reply within 72 hours of receipt of this letter.

Very truly yours,

/s/ Robert A. Scardelletti  
Robert A. Scardelletti  
General Chairman

RAS/pg

**THE PITTSBURGH & LAKE ERIE  
RAILROAD COMPANY**

August 10, 1987

Robert A. Scardelletti  
General Chairman  
Brotherhood of Railway, Airline and  
Steamship Clerks  
1522 Locust Street  
Philadelphia, Penna. 19102

Dear Sir:

With reference to your communication of August 7, 1987 suggesting a meeting to discuss the sale of P&LE lines, we have your suggestion under consideration and will respond within a week.

Sincerely yours,

/s/ Gordon E. Neuenschwander  
Gordon E. Neuenschwander

THE PITTSBURGH & LAKE ERIE  
RAILROAD COMPANY

August 17, 1987

Mr. R. A. Scardelletti, General Chairman  
Brotherhood of Railway, Airline &  
Steamship Clerks, Freight Handlers,  
Express & Station Employes  
1522 Locust Street  
Philadelphia, PA 19102

Dear Mr. Scardelletti:

In response to your August 7, 1987 letter, in which you suggested that we meet to discuss the anticipated sale of Pittsburgh & Lake Erie rail lines and its effects on employees represented by your organization, please be advised that the P&LE is prepared to meet with you in early September with regard to this matter, and will advise you of the precise time and location as soon as the arrangements are complete.

We propose this meeting in the interests of keeping employees informed of plans for the P&LE's future, without prejudice to our position that "Section 6" bargaining under the Railway Labor Act is not necessary or appropriate in this instance. Your letter does not constitute a Section 6 notice, nor should this response be viewed as an agreement to confer pursuant to that section of the statute. The anticipated transaction is controlled by the Interstate Commerce Act and is subject to the authority of the Interstate Commerce Commission. Section 6 bargaining, in the railroad's view, would usurp the ICC's authority over the transaction and management's prerogative to conduct the railroad's business as it sees fit.

With regard to your information requests, I expect that to the extent possible at present, your questions will be answered at our meeting.

Sincerely,

/s/ Gordon E. Neuenschwander  
Gordon E. Neuenschwander

**THE PITTSBURGH & LAKE  
ERIE RAILROAD COMPANY**

September 1, 1987

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Mr. R. A. Scardelletti, General Chairman  
Brotherhood of Railway, Airline &  
Steamship Clerks, Freight Handlers,  
Express & Station Employees  
1522 Locust Street  
Philadelphia, PA 19102

Dear Mr. Scardelletti:

This will acknowledge receipt of your August 31, 1987 letter received in this office on September 1, 1987 which you advise is a formal notice served under Section 6 of the Railway Labor Act, as amended, to negotiate an agreement in line with the proposals contained in the Attachment to your letter.

It is the position of this Carrier that your notice is not a valid notice under Section 6 of the Railway Labor Act since the proposed transaction is controlled by the Interstate Commerce Act and is subject to the authority of the Interstate Commerce Commission. It is our position that Section 6 bargaining of this matter would usurp the ICC's authority over the transaction as well as management's prerogative to conduct the Carrier's business as it sees fit.

It is the further position of this Carrier that your notice is directly related to employee protection and is therefore barred under the moratorium provisions contained in Article XI of Mediation Agreement Case No. A-11616 dated January 14, 1986.

Without prejudice to or waiver of our position, as stated above, we have no objection to meeting jointly with you

and the other organization representatives at a location in Pittsburgh. Although we are unable to coordinate our schedules for a meeting on September 8, 1987 as suggested by you, we suggest an alternate date of September 25, 1987 at a location to be named later. Please advise whether this date is agreeable with you.

The information requested in the last paragraph of your letter is not available at this time but will be discussed at the meeting.

Sincerely,

/s/ Gordon E. Neuenschwander  
Gordon E. Neuenschwander

## WESTERN UNION MAILGRAM

BROTHERHOOD OF RAILWAY AND  
AIRLINE CLERKS  
GRILLO

1522 Locust Street  
Philadelphia PA 19102

This is a confirmation copy of the following message:

2157327410 FRB TDMT Philadelphia PA 103 09-04 0226P  
Est

PMS Mr. Gordon E. Neuenschwander, DLR  
President

Pittsburgh and Lake Erie Railway Company RPT DLY  
MGM, DLR

Commerce Court  
4 Station Square  
Pittsburgh PA 15219

This will acknowledge receipt of your September 1, 1987 letter received in this office on September 4, 1987 wherein you advised that your schedule will not permit you to meet with us on September 8, 1987 and your suggestion of an alternate date of September 25, 1987.

We would advise that your suggested date of September 25, 1987 is too late and we would request to meet earlier as soon as possible after September 8, 1987. We would request that upon receipt of this telegram, you immediately contact us with a date for this meeting which is acceptable to us.

Very Truly Yours,

Robert A. Scardelletti—  
1522 Locust Street  
Philadelphia, PA 19102

14:26 EST

MGMCOMP

EXCERPTS FROM TRANSCRIPT  
OF PROCEEDINGS ON DEFENDANT'S MOTION  
FOR TEMPORARY RESTRAINING ORDER  
[TESTIMONY OF GORDON E. NEUENSCHWANDER]

[3] DIRECT EXAMINATION  
BY MR. WYATT:

Q. Mr. Neuenschwander, I know you were sitting in the court room and you heard his Honor questions, but could you give us an answer to the question of where the sale transaction stands at this point in time?

A. The sale transaction, your Honor—

THE COURT: Let us have his name—

MR. WYATT: I am sorry.

THE COURT: (continuing)— and address.

MR. WYATT: I am sorry. Yes.

THE COURT: We ought to know something about him. He is a good-looking man, but that doesn't say he is going to be a competent witness. I am sure—

MR. WYATT: Certainly, your Honor.

THE COURT: (continuing)—you will let us know he will be.

BY MR. WYATT:

Q. State your name for the record.

A. I am Gordon E. Neuenschwander. I am the Chief Executive Officer and President of the Pittsburgh & Lake Erie Railroad Company.

[4] Q. Mr. Neuenschwander, where do you reside?

A. I reside in Allegheny County in the Wexford area.

Q. As Chief Executive Officer of the Pittsburgh & Lake Erie Railroad Company, have you been involved in negotiations for the sale of the assets of the company?

A. Yes, I have.

Q. And has the company found a purchaser?

A. We have found a purchaser and have entered into an agreement. That was back on July 8th. And the agreement calls for the sale of a major portion of the assets which comprise, really the operating assets and franchises of the Pittsburgh & Lake Erie Railroad Company to P&LE Railco, Inc., which is a subsidiary of Chicago West Pullman Transportation Company.

THE COURT: That is another railroad company?

THE WITNESS: The subsidiary that we have the agreement with, your Honor, is not a railway company. It is a newly formed corporation which has never been in business. Its first transaction is the contract to acquire these assets. It is a part of a holding company which does have among its businesses, I think, three or four smaller rail operations at points in the country other than around here. The closest would be in the Cleveland area. Mostly around Chicago.

THE COURT: What would the proposed purchaser contemplate doing with the bulk of the railway as you say that you would like to sell?

[5] THE WITNESS: Their intention, as I understand it, is to fully operate the assets, which would be conveyed to the new company, as a railroad and maintain the same standard of service with much of the same equipment (the locomotives), as the current P&LE Railroad does today.

THE COURT: And continue on in the same way as the P&LE is doing now?

THE WITNESS: That's correct. Serving the same identical customers in Western Pennsylvania and Eastern Ohio, and even Northern West Virginia, that the P&LE does today, that's correct, sir.

THE COURT: Passenger service?

THE WITNESS: No passenger service. That was discontinued about a year and a half ago.

THE COURT: All right.

BY MR. WYATT:

Q. Mr. Neuenschwander, at this point, you testified, you have signed a sales agreement?

A. Correct.

Q. Is the sales agreement contingent upon approval by any regulatory agency?

A. The agreement would never go to a closing and the assets would never be sold without a filing and the procedures under that filing with the Interstate Commerce Commission. That is the agreement's specific language, and the parties fully con- [6] template that a transaction of this kind by its very nature could not succeed, could never be consummated, without the filing with the Interstate Commerce Commission under provisions of the Interstate Commerce Act.

THE COURT: Has any proceedings been begun or initiated—

THE WITNESS: Your Honor, no—

THE COURT: (continuing)—to—

THE WITNESS: I'm sorry.

THE COURT: Go ahead. You know more than I do.

THE WITNESS: (continuing)—No, there has been—there has been no proceedings instigated before that Commission. However, there is to be a filing in the very near future. I do not control the timing of that. That's the buyer's prerogative on the date. The agreement for the sale of the assets, however, does contemplate a target date for trying to complete the transaction and the filing would certainly have to precede that. But the filing has not yet

been made. But it's my understanding that it would be made in the very near future. A matter of days.

\* \* \* \*

[9] BY MR. WYATT:

Q. Mr. Neuenschwander, I have a couple of additional questions for the record.

Could you tell us the current financial condition of the Pittsburgh & Lake Erie Railroad?

A. Pittsburgh & Lake Erie, as I have indicated in my affidavit, has had a singularly disastrous spell of financial experience in the last five years with the decline in business, the heavy industry in this area, to which we are tied simply by geography. We have lost, really, 60 million dollars. We have, just prior to that time, had the ill-fortune of buying an awful lot of freight cars on credit in about 1980 and '81 when business was doing very, very well. Then along came deregulation, which changed the rules under which railroads operate, favoring long lines, that is, the major railroads, and hurting the little railroads.

And, also, our business sector here, the older mills and what have you, in Pittsburgh have really caused a tremendous, severe decline in the fortunes of the P&LE Railroad. Now, that's—that's just—you say it's on paper, it's dollars. But in real human terms, it has meant a lot of people have lost their jobs. Management on the railroad, to start with, has reduced about 150 per cent. Let's say we had 250 to 280 people around 1980, '81. Now, we're below 100 people in that category; those people who are in the administrative and [10] executive positions who do not operate under labor agreements.

As far as the union group is concerned, they, too, have suffered in that area and been furloughed. And there really no prospect that those people would ever be called back. So, we're down now to a labor force that together with

the less than 100 people amounts to about an average of 750 people that are employed. Normally—that was up until yesterday. Today, we have less than a hundred there. Those people who—who are not subject to labor agreements are still trying to do what they can to keep the lights on, to serve some customers. But we just are not able to do it.

We're losing, roughly, in our situation this year, I think, alone, operating wise, close to about seven million dollars. Seven million dollars. We owe a tremendous amount of debt to banks (some in Pittsburgh), insurance companies and public employee pension funds, who have advanced money to buy railroad equipment—not extraneous assets but good, hard railroad equipment. And we're just not able to pay them. The business isn't here, our costs are too high. And, frankly, we're in a squeeze to the extent where this transaction is the last hope that I think we have of paying part—not all—part of the debt back to these people who have advanced their monies to us. They've been patient with me and with other managers of the P&LE—

THE COURT: You're a nice fellow.

[11] THE WITNESS: How is that? No. No. They—

THE COURT: Well, all right then. Under these circumstances, failure of this deal results in what alternatives?

THE WITNESS: I will answer you directly—but I told this to Senators Spector and Heinz the other day—that if this deal does not go through, all of the employees of the P&LE are subject to termination because there will be no railroad to operate. We just cannot continue on. And the creditors will demand payment on the assets which they have had a lien on—a mortgage on for years.

THE COURT: Well, you just can't stop operation, can you?

THE WITNESS: We would have to file an abandonment proceeding either by a trustee doing it in a bankruptcy

proceeding or voluntarily filing the abandonment, in which case we would be relieved of the obligations.

THE COURT: Would you do that, voluntarily abandon, or would you have to go into bankruptcy?

THE WITNESS: You can do it either way. Probably more quickly would be done in a bankruptcy proceeding with a trustee making a quick determination that there really is no opportunity any longer under operating with current conditions with our labor force that we could ever repay the debt to the people who to, you know, that money is owed.

And then there's the question of balancing the [12] public interest, and we are concerned with that. And even our creditors are very concerned with that. We have important industries here who rely upon the P&LE. You say why? Because if they don't have the P&LE, there's no competitive pricing discipline left. I don't want to point any fingers, but there will only be one railroad that will be handling that coal, or product, for many of these companies.

The P&LE, at least, serves a very strong public mission in running its trains and offering and quoting competitive contract rates, which we are permitted to do. The problem is we just don't get enough business any more. The trucks have moved in and the long lines have hurt us. We're in a box. We're in a box. It's as simple as that.

THE COURT: All right. Go ahead, sir.

BY MR. WYATT:

Q. One last question. The current work stoppage, Mr. Neuenschwander, does that have an effect on the shippers, the shippers that currently use the P&LE?

A. It certainly does. Today—we normally operate about five trains a day. Let's say we have, maybe, four, five-hundred carloads of freight. Obviously, we move a lot of

empties to get those carloads. And today, we're—we're barely struggling to get one train operating. I mean if this continues, it's just going to back up and back up. And we think it will have a damaging effect on industries who aren't getting their [13] product in or not getting it out. And, in turn, that could have a ripple effect certainly with the employment in those places. It's up to them how much stockpile they have.

But, certainly, I can foresee—and I think it's my duty to try to get this railroad running again, because we have a contract to run it.

MR. WYATT: I have no further questions of Mr. Neuenschwander.

THE COURT: Cross-examine?

MR. CLARKE: Yes, your Honor. I have a few.

May I proceed, your Honor?

THE COURT: You may.

#### CROSS-EXAMINATION

BY MR. CLARKE:

Q. Mr. Neuenschwander, let's go back to a couple of questions, or a couple of statements that you made dealing with what would happen if the deal did not go forward, the deal with the Chicago West Pullman.

You indicated that the end result would be a termination of operations and a termination of employment for all 750 of your current employees; is that correct?

A. That's correct, that is what I said.

Q. Now, you also indicated that you now have insufficient assets available to pay all of your outstanding debts. Is that what you said?

[14] A. No, I did not say that—if I had to sell all the assets tomorrow, dump it on the market without a sched-

uled time frame to sell assets over a period of time, the principles of sales would apply and there would be a heavy discount and we would not have enough to pay off the debt. It might take as much as seven years to piecemeal sell off these assets as markets right and fall. Scrap prices go up, they go down. You can't sell on a low market and pay your debt back.

So that would be a—really a liquidating function much like Penn Central had after they sold Conrail off.

Q. All right. Now, let's go back to my question. I asked you whether or not at the present time you had less assets than you do debts. Just yes or no.

A. I think it's about even. I would say we could barely scratch out and come out fairly even.

Q. All right.

A. (continuing)—But the—

Q. You've already answered. Is that correct?

A. Correct. That's today.

Q. All right.

A. (continuing)—A year from now with our operations, it won't work. It will be below.

MR. CLARKE: Your Honor, I'd ask that the response be stricken. That is not what I asked.

THE COURT: He was responding. I would like to [15] hear what he says because I want to know what he is saying.

MR. CLARKE: Yes.

THE COURT: Go ahead, sir.

MR. CLARKE: All right.

BY MR. CLARKE:

Q. As a result of this sale, you are receiving 75 million dollars in cash from the West Pullman system, are you not?

A. No.

Q. How much are you receiving in cash?

A. It's a lesser amount. It is closer to 70 million. But it's not 75.

Q. Now, after the sale, what assets will be left in the Pittsburgh & Lake Erie?

A. There will be some non-operating real estate—a small amount at such interesting places as Connellsville, and what have you (not a heck of a lot of market value there)—and a few pieces here and there around New Castle. I will be honest and say it's worth, maybe, about 2 million spread over three, four years to dispose of that. There will also be railroad cars.

Q. How many railroad cars?

A. There will be about 6,000 railroad cars remaining.

\* \* \* \*

[21] Q. Now, over the years of your—this financial problem that you have suddenly didn't arise today, did it?

A. No. Its been with us for about four years.

Q. And the employees and you have tried to work out arrangements whereby you can keep the railroad afloat, have you not?

A. There have been efforts to that effect. And to the extent that they were successful, we—no question they were helpful.

Q. So, your answer is yes; is that correct?

A. Up to two years ago I would say they were helpful. But then events overtook it.

Q. One of the reliefs that they gave you was to cut back in one craft from five to four days?

A. That's correct.

Q. Other crafts took wage cuts?

A. Correct.

Q. Now, partly as a result of some of those concessions, the P&LE made an arrangement with these crafts that they would—for instance in the one that took the four-day cut, they had a lifetime protection agreement, didn't they? They were guarant [22] eed a job?

A. Yes, they did. They—they had a, for many years, lifetime guarantee with the Pittsburgh & Lake Erie which was an outgrowth of the Penn Central days.

Q. All right. The organization that took the 12 per cent pay cut, what used to be known as the Brotherhood of Railway And Airline Clerks—is that the organization that took the 12 per cent wage cut?

A. They certainly did, yes.

Q. They have a lifetime agreement, a job security agreement, with the P&LE, don't they?

A. With certain people who have that kind of seniority date there are those people that would have that kind of an agreement, yes.

\* \* \* \*

[23] Q. Did you participate in the sale negotiations with the Chicago West Pullman?

A. Yes, I did.

Q. Did you make any effort at all to guarantee the employment of all of the people who are working for you today?

A. Not in that contract. Certainly not, no.

Q. Did you seek to negotiate with them any provisions in the contract that would deal with employees and how they would be protected?

A. Just—the obvious answer is no. I'm just wondering if there might have been a provision or two that had to do with employee records, personnel records and things of that kind. But the answer to your question generally is no, we did not bargain their position away.

Q. Let me try to back up and ask you this. This is really what I'm asking you. You might not have understood my question.

A. Right.

Q. Did you in your negotiations with the Chicago West Pullman attempt to negotiate any provisions that would protect the people or deal with the continued employment of the people who were working for you?

[24] A. Not as a matter of negotiation. We did discuss with them some of their ideas as to what they might do in relation to people that would be adversely affected by the transaction, Mr. Clarke, but it was not made a part of the hard and fast agreement. With the understanding that the matter would be filed with the ICC and people generally try to protect their rights.

Q. Now, why don't we go just a little bit forward, then we'll come back to this in a second. Your understanding was this transaction would be filed with the ICC?

A. Correct.

Q. Is that correct?

A. Correct.

Q. And this transaction—or it would be subject to ICC approval or exemption; is that correct?

A. Correct.

Q. And it was being framed and phrased in a way that would be considered as a sale of an existing rail line to a newly formed rail carrier?

A. Correct.

\* \* \* \*

[25] Q. So that to avoid the employee protection, this transaction [26] was structured as a sale to a newly formed rail carrier, was it not?

A. It was done in that fashion, Mr. Clarke, because it's the only way in which the owners of the P&LE Railroad, the assets being sold, could get any value. We attempted to sell this property and the rail lines to other major carriers that are well known in this industry; the Norfolk Southern, CSX. They would have no parts of it because of the extremely high cost of labor protection. There doesn't begin to be enough business to begin to justify the assumption of full labor ICC protection. It would have cost about 70 million dollars.

\* \* \* \*

[35] Q. Mr. Neuenschwander, you do remember being requested by rail labor shortly after the letter to the employees in July, the end of July, to negotiate about the sale and about the impact of that sale on employees; is that correct?

A. I'm not so sure. I would have to read it again to see whether they asked to negotiate or discuss it.

Q. Is there a difference in your mind between negotiations and discussions?

A. In my mind, generally, if someone says they're negotiating, they're coming from a position of having a right to have me, under a provision of the law, to sit down and discuss a specific specific subject.

In the context of the Railway Labor Act, negotiation is a session set up to get on with some change, by either party, of an arrangement they already have by way of a contract.

And I—I looked at that as an opportunity to sit down and discuss the situation with them.

Q. But not negotiate?

A. But not negotiate, that's right.

Q. Now—

A. (continuing)—I would have to read the letter again, but that's the way I interpreted it.

Q. Now, the first request from the union did inform you that [36] in the union's position you had an obligation to send them a Section 6 Notice to negotiate before you sold; isn't that correct?

A. Yeah. And we were a little perplexed by the arrangement of that letter. That is the way I—we read it.

Q. Subsequently, you received Section 6 notices from virtually all of the 14 organizations that represent employees on your property; isn't that correct?

A. That's correct. They clarified their position. And I think it came right out and said this should be understood to be a Section 6 Notice.

Q. And those notices requested that you negotiate not only about the sale but also about the impact of the sale on the employees?

A. That was the request, yes.

Q. And your position, you and your company's position—

A. Correct.

Q. (continuing)—is that you have no obligation to negotiate with the employees over the sale; isn't that correct?

A. That's correct. As stated by our counsel here today.

Q. And it is also your position that you have no obligation to negotiate, as compared to discuss with the employees,

to negotiate with the employees about the impact of this sale on their employment, the terms and conditions of their employment? Isn't that correct?

[37] A. That's correct.

Q. Now, you have said that you're willing to meet with the employees on the 25th of September; is that correct?

A. (The witness nods his head affirmatively).

Q. Your company is willing to meet with them on the 25th?

A. That's right. And I repeat that now.

Q. And that meeting is simply to discuss with them what's going to happen as a result of this sale; isn't that correct?

A. As best we know it and as best as I can speak from the standpoint of their current employer.

Q. But you are not going to bargain with the employees?

A. That's correct.

Q. And the meeting on the 25th is not to bargain; isn't that correct?

A. It's an informational meeting only that we suggested, without prejudice to our position that we have no obligation to bargain that position.

Q. And you have no obligation to bargain before you go ahead and sell?

A. That's correct.

Q. Now, as far as the sale is concerned, you are aware, are you not, that the employees on the P&LE have received a letter from the Chicago West Pullman Company advising them of the sale and requesting various employment applications?

A. I am not aware that every last employee got it. I even [38] got one.

Q. Who gave them the names and addresses of the employees?

A. I—I can't even tell you that. They didn't ask—they they came to the railroad. They have asked by virtue of the contract to have access to the names and addresses and we agreed that we would do that.

Q. And the personnel files?

A. We have not agreed to turn the personnel files over to Chicago West Pullman. I think they have a right to inspect than but not—not to keep them.

Q. And this is something that was one of the items of your negotiation?

A. That's correct.

Q. Did you negotiate a priority-of-employment right for people who worked on the P&LE with the new company?

A. That was not negotiated, but they have told us that—very clearly—that they intended to—to adhere to that policy to give the P&LE employees the first opportunity. They are the ones who are experienced in that operation.

MR. CLARKE: I have no further questions, your Honor.

\* \* \* \*

## ATTACHMENT C

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C. A. No. 87-1745  
Judge Bloch

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Plaintiff,*

v.

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,  
*Defendant.*

FIRST SUPPLEMENTAL AFFIDAVIT OF GORDON E.  
NEUENSCHWANDER

I, Gordon E. Neuenschwander, being duly sworn on oath, depose and state as follows:

1. This affidavit supplements my affidavit of September 16, 1987.

2. On September 17, 1987 and September 18, 1987, I notified Chicago West Pullman Corporation ("CWP") and the creditors' representatives of the Joint Stipulation and Agreement entered into between RLEA and P&LE dated September 17, 1987 and the terms thereof. I requested that CWP attend the meeting scheduled pursuant to the Agreement, and further asked CWP not to file with the Interstate Commerce Commission any applications related to the acquisition of P&LE's assets on or before September 20, 1987, and to agree to an extension of time for closing the sale of P&LE's assets and not to close until October 10, 1987. As to the creditors, I requested their

representatives to agree to an extension of time for closing the sale of P&LE assets until October 10, 1987. Upon my direction, after advice from CWP and the creditors' representatives that such an extension was not agreeable, notice was given on September 19, 1987, at 4:00 p.m. E.S.T., to the designated representatives of RLEA that P&LE had not obtained the required consent to extend the closing of the sale until October 10, 1987.

3. I am advised by my officers that P&LE's employees who are members of our striking unions resumed their picketing within the hour on September 19, 1987 of being informed the consent was not obtained. Additionally, I am further advised by my officers that picketing by RLEA's member unions has not extended to the railroad subsidiaries of the purchaser, CWP.

4. The effect of the resumed strike on P&LE is greater than that described in my previous affidavit, because P&LE's railroad operations are virtually shut down.

5. After the sale to CWP, P&LE will continue to exist, though not as a rail carrier. Its assets will consist largely of non-railroad real estate holdings and some 6000 railcars which it will continue to lease or sell to shippers and carriers. It is my intention to satisfy all debt obligations remaining after the sale to CWP with the net proceeds that can be obtained from the sale and lease of the remaining properties of the surviving company. I will direct the activities of the surviving company.

/s/ Gordon E. Neuenschwander  
Gordon E. Neuenschwander

Sworn to and subscribed before me, a Notary Public in and for the County of Allegheny, PA., this 21st day of September, 1987.

/s/ John D. Hartman  
Notary Public

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 87-1745

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Plaintiff,*

v.

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY  
*Defendant.*

FIRST SUPPLEMENTAL AFFIDAVIT OF JAMES D.  
PETERS

I, James D. Peters, being duly sworn on oath, depose and state as follows:

1. I am Director, Labor Relations, for The Pittsburgh and Lake Erie Railroad Company ("P&LE").
2. On Friday, September 18, 1987, pursuant to the Joint Stipulation and Agreement, I met with 26 officials representing all of P&LE's labor organizations, except the International Brotherhood of Firemen and Oilers. The meeting was held at the Redwood Days Inn Motel on Banksville Road, Pittsburgh, Pennsylvania from 1:30 P.M. until approximately 4:15 P.M.
2. During the discussion, the labor representatives asked if the P&LE would be willing to sit down and attempt to work out an employee stock ownership plan (ESOP) in lieu of selling the Company. I told the representatives that P&LE had a binding sales agreement with Chicago West Pullman Transportation Corporation ("CWP") and that perhaps an ESOP plan should more appropriately be discussed with CWP.

3. The representatives stated that they did not desire to discuss an ESOP plan with CWP but rather with P&LE. I advised them that, if they presented an ESOP plan we would take a look at it, but such a plan would have to include a provision to indemnify P&LE from any liability for breach of the sales agreement with CWP. I also pointed out that we were maintaining our position that we had no obligation to bargain the sale of P&LE's assets nor its effects, but were willing to look at such a plan without prejudice to that position.

4. The representatives also asked what it would take in reduced expenses and/or increased revenues to keep the company intact and prevent its sale. I told them that I did not have that specific dollar figure but I would attempt to have it for them for the September 19th meeting.

5. The meeting reconvened at approximately 10:00 A.M. on Saturday, September 19, 1987 at the Greentree Holiday Inn in Pittsburgh, Pa. There were 29 officials in attendance representing all of P&LE's labor organizations.

6. I advised the representatives that the bottom line number as discussed at yesterday's meeting had been calculated to be a minimum of \$15 million per year. This was disregarding the fact that we had a binding sales agreement and did not include any liability for breach of that agreement. I further advised the representatives that this number could be any combination of reduced number of jobs, wages, other expenses or increased net revenue. It was the bottom line number that was required to make the P&LE a viable company.

7. The representatives advised that a formal ESOP proposal would be made on September 20, 1987. I asked them what the offer would include and they replied that they had not seen it but would have it on Sunday, September 20, 1987. They stated that they would like to present it to the company even if the sales closing date delay was

not obtained and they were again on strike. The meeting adjourned at approximately 12:15 p.m.

8. At approximately 4:00 p.m. on September 19, 1987 the appropriate representatives were advised that P&LE had been unable to obtain the delay in closing of the sale until October 10, 1987.

9. Subsequently, Mr. Roger Yanssens was notified as a representative of the group, that the ESOP proposal could be delivered to the P&LE on Sunday, September 20, 1987 as requested.

10. P&LE has a previously scheduled meeting with all labor groups who have served section 6 notices, on September 25, 1987.

/s/ J.D. Peters  
J.D. Peters

Sworn to and subscribed before me, a Notary Public in and for the County of Allegheny, PA., this 21st day of September, 1987.

John D. Hartman  
Notary Public

**BEFORE THE  
INTERSTATE COMMERCE COMMISSION  
WASHINGTON, D.C.**

**Finance Docket  
No. 31121**

P&LE RAILCO, INC.—EXEMPTION—ACQUISITION AND  
OPERATION—THE PITTSBURGH AND LAKE ERIE RAIL-  
ROAD COMPANY, and THE YOUNGSTOWN AND SOUTH-  
ERN RAILWAY COMPANY

**Finance Docket  
No. 31122**

CHICAGO WEST PULLMAN CORPORATION—CONTINU-  
ANCE IN CONTROL EXEMPTION—P&LE RAILCO, INC.  
AND—CONTROL EXEMPTION—THE PITTSBURGH,  
CHARTERS AND YOUGHIOGHENY RAILWAY COMPANY

**PETITION TO REJECT VERIFIED NOTICES  
OF EXEMPTION AND REQUEST FOR STAY  
PENDING RULING ON PETITION TO REJECT**

On September 19, 1987, the P&LE Railco, Inc. (Railco) filed a Verified Notice of Exemption with this agency purporting to invoke the exemption from the prior approval requirements of 49 U.S.C. §10901 which was granted to all newly formed rail carriers by *Ex Parte No. 392 (Sub. No.-1)*, 1 I.C.C. 2d 810 (1986), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d. 145 (D.C. Cir. 1987) (Table), as set forth in 49 C.F.R. §1150.31, *et seq.* At the same

time, Railco's real owner, the Chicago West Pullman Corporation (CWP), filed a Notice of Exemption under 49 C.F.R. §1180.2(d)(2) to control Railco, its immediate parent, Chicago West Pullman Transportation Corp. (CWPT), and its affiliate PC&Y Holdings (Holdings). The Railway Labor Executives' Association (RLEA) respectfully submits that the Verified Notices are deficient and should be rejected under 49 C.F.R. §1104.10, for they fail to identify all of the rail ownerships being transferred by this transaction and do not comply with the requirements of 49 C.F.R. §§1105.7 and 1105.11.

Since RLEA and the public will suffer irreparable harm if the parties to this sale transaction consummate the sale while this petition to reject is still pending, RLEA requests that the Commission stay the effectiveness of the exemptions under 49 C.F.R. §§1150.32(b) and 1180.2(d)(2) pending such a ruling.

**A. Railco's and CWP's Verified Notices Of Exemption Are Inaccurate And Omit Relevant Information**

Railco's Notice of Exemption states that it will be acquiring the rail lines, operating properties and certain other assets of the Pittsburgh & Lake Erie Railroad Company (P&LE) and its wholly-owned subsidiary, the Youngstown & Southern Railway Company (Y&S). CWP's notice shows further that the P&LE will also be transferring its one-half ownership interest in the Pittsburgh, Chartiers & Youghiogeny Railway Company (PC&Y). However, the Notices fail to mention that among the assets of the P&LE being transferred is a part ownership of the Mononogahela Railway Company (MR), in which the P&LE is a one-third owner, along with Conrail and CSX Transportation. See P&LE's Annual Report to the Pennsylvania Public Utility Commission for the year ended December 31, 1986, a copy of which is attached hereto as Attachment 1. Despite P&LE's one-third ownership of MR, this fact is not disclosed in either Notice of Exemption even though P&LE's

interest in MR will be conveyed to Railco.<sup>1</sup> This inaccuracy in the Notice is significant for several reasons: First, it omits reference to the fact that Railco will obtain an interest in another carrier, the MR, which is a rail carrier jointly owned with two Class I carriers; acquisition of control of two rail carriers by a non-carrier is a section 11343(a)(4), and not a Section 10901 transaction. Second, Railco and CWP have indicated that in compliance with 49 C.F.R. §§1150.33(g) and 1180.4(g)(3), they have given the notice required by 49 C.F.R. §1105.11, and presumably, sent an environmental notice to the states where the affected rail lines are located (presumably Pennsylvania and Ohio); however, there is no indication that a notice has been provided to the State of West Virginia where much of MR's line is located. And third, RLEA understands that although P&LE is one of three owners of the MR, the P&LE has been responsible for labor relations on the MR. Thus, the fact that Railco would assume P&LE's interests in MR is of great interest to rail labor. See, Declaration of W. R. LaRue, attached hereto as Attachment 3, at ¶3.

Moreover, Railco and CWP have failed to disclose that among P&LE's assets is the Montour Railroad Company (MTR) which P&LE has sought to abandon. P&LE had failed for exemption from prior Commission approval under 49 U.S.C. §10903 of its abandonment of the entire MTR line (Docket AB-160 (Sub-No. 5x)); following a Com-

<sup>1</sup> In a hearing in the U.S. District Court for the Western District of Pennsylvania relating to the labor relations aspects of this transaction, Gordon E. Neuenschwander, President of P&LE, testified that after the sale of P&LE's remaining assets will be some real property and approximately 6,000 rail cars. He did not state that P&LE would retain its interest in MR. Transcript of Neuenschwander testimony at 15-16, a copy of the Transcript is attached hereto as Attachment 2. Also, P&LE's Director of Labor Relations has informed rail labor that the P&LE's ownership in the MR is also being transferred to the CWP system. See, Declaration of W. E. LaRue at ¶2, attached hereto as Attachment 3.

mission decision granting an exemption, the RLEA requested reopening on the basis that MTR was not a separate corporate entity but rather merely a part of the P&LE. On August 31, 1987, the Commission served a decision granting RLEA's request for reopening. See, *Montour Railroad Company—Abandonment Exemption-In Allegheny and Washington Counties, Pa.*, Docket No. AB-160 (Sub-No. 5x). Since the abandonment exemption proceeding has been reopened, the line is not yet abandoned, and this matter is still pending; its resolution may have an impact on the subject transaction and certainly is a matter which should have been set forth in Railco's and CWP's Notices of Exemption.

**B. Railco's And CWP's Verified Notices Are Incomplete In That They Fail To Comply With 49 C.F.R. §§1105.7 and 1105.11**

When Railco's and CWP's Verified Notices are examined, they both show that Railco and CWP did not submit an Environmental Report as required by 49 C.F.R. §1105.7, nor do those notices contain a copy of the notice which Railco and CWP purportedly used to comply with 49 C.F.R. §1105.11 as required by 49 C.F.R. §§1150.33(g) and 1180.4(g)(3). These deficiencies require that the Verified Notices be rejected *before* the sale is consummated and the new operator's drastic cut-back in employment levels damages the environment.

While 49 C.F.R. §§1150.33 and 1180.4(g) do not specifically state that an Environmental Report is required to be filed along with a Verified Notice of Exemption, they do not provide, as Railco and CWP assumed, that a new carrier or person seeking control is relieved of the obligation under 49 C.F.R. §1105.7 to file such a report in an acquisition or a control case. As this Commission explained in Docket AB-239x, *S.R. Investors, LTD.—Abandonment*, served July 20, 1987, even though the environmental report regulations—i.e., 49 C.F.R. §1105.7—

are not cross-referenced under the exemption rules, they still apply to rail exemptions. Slip op. at 10. Since the environmental regulations in Part 1105 are intended to implement the policies of both the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4332, *et seq.*, and the National Historic Preservation Act of 1966, 16 U.S.C. §470, *et seq.*, the policies of those Acts, this Agency has stated, are applicable even if the carriers are proceeding by way of an exemption to effectuate a transaction which, if it had been the subject of an application for approval, would have required environmental impact analysis:

The environmental reporting requirements of 49 CFR 1105.7 should be applied to abandonment exemption proceedings under 49 U.S.C. 10505 (as well as to abandonment applications filed under section 10903) [and, RLEA submits, to exemptions under *Ex Parte No. 392* or under 49 C.F.R. §1180.2(d)]. An environmental report is intended to ensure agency knowledge and consideration of the possible environmental consequences of pending proceedings. An environmental report also ensures adequate notice to environmental agencies.

Docket AB-239x, *supra*, slip op. at 10.

This is not a hollow or technical requirement in this case, for the P&LE is a rail carrier which owns lines which have been in operation for almost 100 years. As shown by the attached Declaration of Ms. Maria S. Lazar, which is attached hereto as Attachment 4, several of the P&LE's structures are currently listed on the National Register of Historic Places (NRHP), and many other structures are over 50 years old and may meet NRHP criteria. See, *Boyd v. Roland*, 789 F.2d 347, 349 (5th Cir. 1986); Docket No. AB-239x, *supra*, slip op. at 9. Moreover, as shown by the Declaration of Mr. W. E. LaRue at ¶4, CWP intends to reduce the P&LE current employment levels of around

750 people to around 210 employees, plus an unspecified number of supervisors. Thus, the maintenance of those historical structures and their preservation is potentially in jeopardy. Also, CWP's plans to reduce P&LE's employment levels so drastically places in serious question many other environmental matters which invariably arise when a rail carrier operating in a populace area such as Pittsburgh, Pennsylvania and Youngstown, Ohio, provides rail service without adequate maintenance or personnel to operate safely. See, LaRue Declaration at ¶5.

These concerns are heightened in this case by Railco's and CWP's failure to file an Environmental Report and their failure to file the notice, if any, which they provided to the appropriate state agencies under 49 C.F.R. §1105.11. By failing to show this Agency the manner in which they complied with Section 1105.11, Railco and CWP have deprived this Agency of a record to enable this Agency to comply with NEPA and Section 106 of NHPA by considering the effect of this sale on both the environment and historical sites *before* this Agency allows the transaction to occur. *E.g.*, Docket AB-239x, *supra*. Unless this agency does not know exactly what form of notice, if any, was given to the appropriate state agencies, the failure of a state agency to object cannot be used as support for a conclusion that the states do not foresee an adverse environmental impact. Also, without the appropriate state impact analysis and an adequate Environmental Report, this Commission's Section of Energy and Environment cannot be expected to have sufficient information to perform an environmental assessment.

One final concern over the completeness of Railco's and CWP's certificates under 49 C.F.R. §§1150.33(g) and 1180.4(g)(3) should be noted. Railco and CWP state that they have complied with the notice requirements in 49 C.F.R. §1105.11 "to the extent that those requirements are applicable to the transaction that is the subject of this notice." Verified Notice in Finance Docket No. 31121 at

4; Notice in Finance Docket No. 31122 at 5. The problem with those certifications is that Railco and CWP may have acted under the false impression that they are not required by 49 C.F.R. §1105.11 to provide a notice because 49 C.F.R. §1105.6(c)(2) excuses an applicant from the requirements of filing an Environmental Report or giving notice to the states where the transaction involves a change in ownership. However, Section 1105.6(c)(2), by its very terms, does not apply here because this transaction also "involv[es] a change in carrier operations including overall levels of employment. . . ." 49 C.F.R. §1105.6(c)(2). See, Declaration of W. E. LaRue at ¶4.5. By not attaching their environmental notices to their Verified Notices, Railco and CWP have not given this agency an adequate record to assure itself that the notices were in fact given, and, thus, the certificates of compliance with Section 1105.11 are inadequate.

Since Railco and CWP have not complied with 49 C.F.R. §1105.11, and have not filed the Environmental Report required by 49 C.F.R. §1105.7, this Agency should reject their Notices of Exemption.

## II. REQUEST FOR A STAY AND REASONS THEREFORE

RLEA respectfully submits that a stay of the effectiveness of the exemption in this case pending a Commission ruling on this petition to reject and pending a ruling on RLEA's Complaint in Finance Docket No. 31126, *RLEA v. P&LE*, is warranted by the equities in this case and by the fact that RLEA is very likely to succeed on the merits of its challenges to the sufficiency of the Notices and to the applicability of *Ex Parte* No. 392 to the consolidation transaction at bar.

As this agency explained in Finance Docket No. 31089, *Montana Rail Link, Inc.—Exemption*, served July 31, 1987, the traditional standards for interim injunctive relief as set forth in *Washington Metropolitan Area Transit Comm.*

*v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), are applicable to stay requests of ICC orders, and require both a balancing of the equities and a consideration of that balance with the likelihood of success on the merits. Finance Docket No. 31089, *supra*, slip op. at 3. In this case, RLEA clearly should prevail on its petition to reject. Moreover, it is respectfully submitted, the facts in this case will establish that this sale is actually one subject to Section 11343(a), and not Section 10901. Also, RLEA respectfully submits, a balancing of the equities strongly favors the employees and the public and, thus, requires that a stay be granted.

Here, the Verified Notices do not comply with the requirements of 49 C.F.R. §§1105.7 and 1105.11, and, thus, must be rejected as being incomplete. Since the notices are incomplete in a manner which vitiates the ability of ~~this~~ Agency to satisfy its obligations under NEPA and Section 106 of NHPA, and since those Acts are not subject to a retroactive remedy where their pre-consummation violation is apparent on the face of an agency action, this stay must be granted under the public interest considerations protected by NEPA and by Section 106 of NHPA. Moreover, as explained above, a sale before those Acts are complied with has the very real potential in this case, due to CWP's plans to cut P&LE's employment levels so drastically, of damaging both the environment and protected historical structures before this Agency has an opportunity to comply with the policies of those Acts. LaRue Declaration at ¶5. That potential harm is irreparable.

Also, as shown by the Petition for a Temporary Cease and Desist Order which RLEA has filed in its Complaint case, Finance Docket No. 31126, the impact of this sale on employees will be devastating and irreparable. Over 400 of the P&LE's current 650 contract employees will lose their jobs once this sale occurs. Those that are able to obtain employment with the new P&LE—i.e., Railco—will do so under working conditions and pay that are sub-

stantially less favorable than they currently enjoy. LaRue Declaration at ¶4. If RLEA ultimately prevails on the merits of its Complaint, P&LE, CWP and Railco will be required to reimburse those employees for the losses which they suffered in the interim, but there will be a very real question as to the ability of those parties to pay such an award. P&LE will be insolvent once this transaction occurs (Attachment 2, Tr. at 10, 16), but apparently it is not now insolvent. *Id.* at 14. Thus, the harm to employees, if allowed to occur, will be irreparable.

On the other hand, there can be no harm to the P&LE, CWP or to Railco, if this stay is granted, which is not of their own making. P&LE has stated in Court that if the sale is delayed, its creditors will seek to have it liquidated. Attachment 2, Tr. at 11. However, that cannot occur except under the Railroad Reorganization Provisions of the Bankruptcy Code, 11 U.S.C. §1161, *et seq.*, in which case the rights of *all* creditors (and not just the 22 creditors being given preferential treatment under this sale) and the public will be protected. Also, in such a proceeding, P&LE employees will be able to have their ESOP proposal considered and, RLEA submits, accepted. *See*, Declaration of W. E. LaRue at 16.

### CONCLUSION

For the reasons set forth above, RLEA respectfully requests that the Verified Notices be rejected as incomplete, and that this Commission stay the effectiveness of the exemptions pending a ruling on this petition to reject.

Respectfully submitted,

/s/ John O'B. Clarke, Jr.

John O'B. Clarke, Jr.

Richard S. Edelman

HIGHSAW & MAHONEY, P.C.

Suite 210

1050 17th Street, N.W.

Washington, D.C. 20036

(202) 296-8500

Date: September 25, 1987

# CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing Petition To Reject Verified Notices Of Exemption And Request For Stay Pending Ruling On Petition To Reject by hand delivery to the following:

Edward K. Wheeler, Esquire

WHEELER & WHEELER

1729 H Street, Northwest

Washington, D.C. 20006

Dated at Washington, D.C. this 25th day of September, 1987.

/s/ John O'B. Clarke, Jr.

John O'B. Clarke, Jr.

## BEFORE THE INTERSTATE COMMERCE COMMISSION WASHINGTON, D.C.

— — —  
Finance Docket  
No. 31126  
— — —

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
400 First Street, N.W.  
Washington, D.C. 20001

*Complainant,*

v.

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
Commerce Court  
Four Station Square  
Pittsburgh, PA. 15219-1199,

and

CHICAGO WEST PULLMAN CORPORATION;  
CHICAGO WEST PULLMAN TRANSPORTATION CORP.;  
P&LE RAILCO, INC.; and PC&Y HOLDINGS, INC.,  
2728 East 104th Street  
Chicago, ILL. 60617

*Defendants.*

## COMPLAINT FOR CEASE AND DESIST ORDER AND OTHER RELIEF

1. This is a complaint by the Railway Labor Executives' Association (RLEA) against the Pittsburgh & Lake Erie Railroad Company (P&LE) and the purchaser of the rail properties of the P&LE—i.e., the Chicago West Pullman Corporation (CWP) and its corporate affiliates, Chicago

West Pullman Transportation Corp. (CWPT), P&LE Railco, Inc. (Railco), and PC&Y Holdings, Inc. (Holdings)—to enforce the commands of 49 U.S.C. §11343(a)(2),(3),(4) and (5), which complainant RLEA submits defendants are violating by transferring without prior Commission approval under 49 U.S.C. §11344 the rail properties of the P&LE and the Youngstown & Southern Railway Company (Y&S), and the P&LE's ownership interests in two rail carriers, the Pittsburgh, Chartiers & Youghiogeny Railway Company (PC&Y) and the Monogahela Railway Company (MR). By this Complaint, RLEA is requesting that this Commission issue an immediate cease and desist order to prohibit defendants from consummating this purchase and acquisition of control until they have complied with the prior approval requirements of 49 U.S.C. §11343(a). Alternatively, if an immediate cease and desist order is not issued and defendants consummate this sale, complainant RLEA requests that this Commission both order defendants CWP and its affiliates to divest their interest in the P&LE assets, and direct all defendants to make whole all employees who may have been improperly affected in the interim.

#### PARTIES

2. Complainant RLEA is an unincorporated association of the Chief Executive Officers of nineteen (19) labor organizations which collectively represent most of the organized rail employees in this country, including virtually all of P&LE's organized employees. RLEA maintains its offices at 400 First Street, N.W., Washington, D.C. 20001. A list of RLEA's member organizations is attached hereto as RLEA Exhibit 1.

3. The labor organizations which represent P&LE employees and whose chief executive officers are members of the RLEA are "representative[s]" as that term is defined in Section 1 Sixth of the Railway Labor Act, 45 U.S.C. §151 Sixth. Those organizations are the duly des-

ignated representatives of various crafts or classes of P&LE employees and with RLEA, have standing before this agency under 49 U.S.C. §10328(a).

4. Defendant P&LE is a privately-held corporation incorporated in the State of Delaware with its principal place of business in Pittsburgh, Pennsylvania. P&LE operates a 182-mile railroad in western Pennsylvania and eastern Ohio, transporting coal and steel to the Great Lakes region. P&LE is a Class II rail carrier and a "carrier" within the meaning of 45 U.S.C. §151 First. P&LE maintains offices at Commerce Court, Four Station Square, Pittsburgh, Pennsylvania 15219-1199. P&LE owns the Y&S, and owns a 50% interest in the PC&Y, and a 33-1/3% interest in the MR.

5. Defendant CWP is a holding company which owns and operates at present four Class III rail carriers: Chicago, West Pullman & Southern Railroad company ("CWPSR"), Manufacturers Junction Railway company ("MJ"), Newburgh & South Shore Railroad Company ("NSS") and Wisconsin & Calumet Railroad Company ("WC"). Defendant CWP has formed defendant CWPT a wholly-owned subsidiary, and has caused defendant CWPT to form two wholly-owned subsidiaries, defendants Railco and Holdings.

6. Defendants CWP, CWPT, Railco, and Holdings maintain offices at 2728 East 104th Street, Chicago, Illinois 60617. CWP's subsidiary, CWPSR, also maintains its office at that location.

#### STATEMENT OF FACTS

7. In June or July of 1987, defendant P&LE entered into an agreement, presumably with CWPT, whereby defendant Railco would acquire the rail lines, operating properties and certain other assets of the P&LE and its subsidiary, the Y&S.

8. Upon acquisition of the rail lines, operating properties and certain other assets of P&LE and YS, defendant Railco will become the operator of the P&LE and YS rail lines.

9. As a result of the transaction between defendants CWPT, Railco and P&LE, Railco will also acquire and operate over (1) 31.6 miles of trackage rights over a Conrail line between Youngstown, Ohio and Shenango, Pennsylvania; (2) 60.6 miles of trackage rights over a Conrail line between Youngstown, Ohio and Ashtabula Harbor, Ohio; and (3) 136.8 miles of trackage rights over a Norfolk & Western line between Geneva, Ohio and Buffalo, New York.

10. Upon the closing of the transaction, defendant Railco will direct P&LE to deliver to Holdings 50% of the stock of the PC&Y. Conrail owns the other 50% interest in PC&Y. Defendant P&LE's President and CEO is currently the President and CEO of the PC&Y, and defendant P&LE both operates the PC&Y and handles the labor relations for that carrier.

11. Upon information and belief, Complainant RLEA states that defendant P&LE will transfer to defendant CWP, or to one or more of its affiliates, defendant P&LE's one-third interest in MR. Conrail and CSX Transportation own the remaining 66-2/3% of the MR, in equal ownership interests. Defendant P&LE's President and CEO is the President of the MR, and defendant P&LE operates the MR and performs its labor relations.

12. Defendant Railco was formed by defendant CWP for the purpose of acquiring P&LE's rail lines, operating properties and certain other assets.

13. Defendants CWP, CWPT, Railco and Holdings, and the CWPSR all have the same President, Roger E. Smith.

14. Defendant P&LE will receive approximately \$70 million in cash in return for the sale of its rail lines, operating properties and certain other assets to Railco;

however, defendant P&LE currently has debts in excess of \$125 million.

### COUNT I

15. The exemption sought by defendant Railco in its September 19, 1987 notice of exemption in Finance Docket No. 31121 applies only to transactions governed by 49 U.S.C. §10901.

16. 49 U.S.C. §10901, as relevant here, applies only to transactions involving an entity which has not previously been a rail carrier.

17. 49 U.S.C. §10901 does not apply to transactions involving the purchase of the properties of a rail carrier by an entity which has not previously been a rail carrier but which is related to, and is not independent of, a rail carrier. Moreover, 49 U.S.C. §10901 does not apply to the acquisition of control of at least two (2) rail carriers by an entity that is not a rail carrier.

18. Defendants CWPT, Railco and Holdings are controlled by CWP which also owns four other rail carriers, CWPSR, MJ, NSS and WC; moreover, defendants CWPT, Railco and Holdings will control three railroads by this sale transaction, as the term "control" is used in Section 11343(a) of the Act.

19. Upon information and belief, complainant RLEA states that defendants CWPT, Railco and Holdings are not independent from CWP and its other rail carrier subsidiaries.

20. Upon information and belief, RLEA states that CWP and/or its other subsidiaries either provided funds for CWPT's and Railco's purchase of the P&LE assets, or guaranteed loans for CWPT and/or Railco which are the source of the funds to be used in purchasing the P&LE assets.

21. By seeking to use the exemption provided in 49 C.F.R. §1150.31, *et seq.*, as "authority" to transfer both the rail properties of the P&LE, and that carrier's interests in the PC&Y and MR, defendants are violating the prior approval requirements of 49 U.S.C. §11343(a)(2),(3),(4) and (5).

## COUNT II

22. RLEA repeats and realleges and incorporates herein each and every allegation contained in paragraphs 1 through 21 above.

23. In a hearing in the United States District Court for the Western District of Pennsylvania regarding the labor relations aspects of the sale of P&LE's rail lines, operating properties and certain other assets, Gordon E. Neuenschwander, President and CEO of the P&LE testified that the transaction between P&LE and CWP was structured deliberately to avoid treatment of the transaction as one governed by 49 U.S.C. §11343, and subject to 49 U.S.C. §11347. See Transcript of Mr. Neuenschwander's testimony (attached as an Exhibit 2 to this Complaint) at pp. 24-26.

24. Defendant Railco is not entitled to the exemption sought in its Notice of Exemption in Finance Docket No. 31121 because it was created for the purpose of unlawfully evading the obligations it, defendant P&LE, and defendants CWP and its affiliates, would have had under 49 U.S.C. 11347 if the transaction were structured as required by 49 U.S.C. §11343.

## COUNT III

25. Complainant RLEA repeats and realleges and incorporates herein each and every allegation contained in paragraphs 1 through 21 above.

26. Defendant CWP has sought an exemption from prior Commission approval of its control of Railco and Holdings pursuant to 49 C.F.R. §1180.2(d)(2).

27. 49 C.F.R. §1180.2(d)(2) does not apply to control transactions which involve a Class I carrier.

28. Defendants' Railco purchase of P&LE's rail lines, operating properties and certain other assets involves the acquisition of trackage rights over rail lines owned by Conrail and the Norfolk and Western Railway, which are Class I carriers; this transaction also involves the transfer of P&LE's joint ownership of the PC&Y with Conrail, and the P&LE's joint ownership of MR with Conrail and CSX Transportation. All three of those carriers—i.e., Conrail, Norfolk & Western and CSX Transportation—are Class I rail carriers.

29. Defendant CWP is not entitled to the exemption sought in its Notice of Exemption because the subject transaction involves Class I carriers and, thus, is not an exempt transaction under 49 C.F.R. §1180.2(d)(2). Therefore, plans to consummate this control transaction without prior ICC approval are in violation of 49 U.S.C. §11343(a).

## RELIEF REQUESTED

WHEREFORE, RLEA requests that the Commission:

A. ORDER that defendants Railco and P&LE cease and desist from implementing the transaction referred to in Finance Docket No. 31121;

B. ORDER defendant CWP and its subsidiaries to cease and desist from implementing the control transactions for which they have sought an exemption in Finance docket No. 31122;

C. However, if this sale is consummated before the Commission issues a cease and desist order, RLEA requests that this agency (i) direct defendant CWP and its

subsidiaries to divest their ownership interests in the P&LE assets and (ii) order defendants to make whole all employees who may have been adversely affected by this sale; and

D. Grant RLEA such other and further relief as this Commission deems to be just and proper.

### REQUEST FOR ORAL HEARING

Complainant RLEA requests that this Complaint be handled at an oral hearing. RLEA submits that the bad faith allegation in Count II and the financial dependence and control issues raised in Count I of this Complaint present credibility questions which can be handled only by an oral hearing with an opportunity to cross-examine witnesses and test their credibility.

Respectfully submitted,

/s/ John O'B. Clarke, Jr.

John O'B. Clarke, Jr.

Richard S. Edelman

HIGSAW & MAHONEY,

P.C.

Suite 210

1050 17th Street, N.W.

Washington, D.C. 20036

(202) 296-8500

Date: September 24, 1987

### UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 87-1745

Judge Bloch

RAILWAY LABOR EXECUTIVES' ASSOCIATION

*Plaintiff,*

v.

PITTSBURGH & LAKE ERIE RAILROAD CO.,

*Defendant*

### SECOND SUPPLEMENTAL AFFIDAVIT OF JAMES D. PETERS

I, James D. Peters, being duly sworn on oath, depose and state as follows:

1. I am Director, Labor Relations, for the Pittsburgh and Lake Erie Railroad Company ("P&LE"). This second supplemental affidavit supplements my prior affidavits of September 16, 1987 and September 21, 1987.

2. As a preliminary matter, I would like to correct erroneous assertions by the Railway Labor Executives' Association that the P&LE never responded to the September 4, 1987 telegram of Robert A. Scardelletti, a Vice President for one of P&LE's unions, the Transportation Communications Union International. Mr. Scardelletti there requested that the meeting date of September 25, 1987, designated by P&LE for a meeting with all of its 14 unions to discuss the sale, be advanced as soon as possible to a date after September 8, 1987. By letter dated September 14, 1987, Gordon E. Neuenschwander, President and Chief Executive Officer of P&LE, responded that the September 25, 1987 date was the earliest convenient date for all

parties involved. A true and correct copy of this letter is attached to my original affidavit as Exhibit 8(a).

3. In my previous affidavit, I indicated that the P&LE had received Section 6 notices from many of P&LE's unions seeking changes to P&LE's collective bargaining agreements in connection with the sale of P&LE's railroad assets. Since that time, the P&LE has received Section 6 notices from two additional unions, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers and the United Transportation Union, on September 15, and September 17, 1987, respectively. True and correct copies of these Section 6 notices are attached as Exhibits 1 and 2. P&LE, by letters dated September 18, 1987 from Mr. Neuenschwander, acknowledged receipt of these Section 6 notices and, without prejudice to P&LE's position that it had no duty to bargain over these notices, indicated that it was willing to discuss the notices at the previously arranged meeting on September 25, 1987. True and correct copies of these letters are attached as Exhibits 3 and 4.

4. After the Court ruled on September 21, 1987 that P&LE had not satisfied an obligation to bargain over the effects of the sale of its rail assets, P&LE met with representatives of all of its unions on September 23, 1987 to attempt to reach an agreement on the effects of the sale. P&LE's agreement to meet on the subject was without waiver or prejudice to its position that it did not have a duty to bargain over the effects of the sale. The discussions were continued at a meeting between the parties on September 25, 1987. While the parties exchanged proposals, no agreement was reached. The meetings have been recessed until the parties agree to reconvene.

5. In the meantime, the P&LE's operations continue to be curtailed by the strike. In addition, on September 23, 1987, picketing spread to the Pittsburgh, Chartiers and Youghiogheny Railway ("PC&Y"), which is owned 50% by

P&LE and 50% by Conrail. The PC&Y interchanges with the P&LE and Conrail. As a result of this picketing, the PC&Y's operations have also been curtailed, because P&LE is unable to interchange with PC&Y to provide rail service to and from industries located on the PC&Y.

/s/ James D. Peters  
James D. Peters

Sworn to and subscribed before me, a Notary Public in and for the County of Allegheny, Pennsylvania, this 30th day of September, 1987.

/s/ John D. Hartman  
Notary Public

## Attachment 3

September 16, 1987

James A. Fisher  
 General Chairman  
 United Transportation Union  
 Box 190, R. D. #1  
 Waynesburg, Pa. 15370

Mr. Gordon E. Neuenschwander, President  
 Pittsburgh & Lake Erie Railway Company  
 Commerce Court  
 4 Station Square  
 Pittsburgh, Pennsylvania 15219

Dear Mr. Neuenschwander:

In response to your notices to P&LE employees regarding the proposed sale of the P&LE's rail lines, operating properties and certain other assets, this Organization has advised you that it is our position that such a transaction cannot be effected without compliance with provisions of the Railway Labor Act regarding notice, negotiations and maintenance of the status quo pending completion of Railway Labor Act procedures. Additionally, we requested that you provide this Organization with information relating to this transaction.

The proposed sale will obviously affect the working conditions of P&LE employees so in the interest of expediting negotiations, but without prejudice to our position that P&LE had an obligation to serve its own Section 6 notice before entering any agreement for the sale of its rail line and other assets, please consider this letter a Section 6 notice; our proposals are contained in the attachment to this letter. This Organization intends to coordinate its bargaining in this manner with the other Organizations on the property and proposes that a meeting between P&LE and this organization be held at a mutually agreeable location and date in Pittsburgh Pennsylvania.

You have proposed a meeting in early September "in the interest of keeping employees informed of plans for P&LE's future". We are amenable to such a meeting without prejudice to this Organization's position regarding P&LE's obligations under the Railway Labor Act, and suggest such a meeting be held concurrent with the initial meeting we have proposed for negotiations regarding our proposals.

In order to facilitate our discussions we again request that, in advance of our meeting you provide us with information regarding this transaction; including, but not limited to contingencies which must yet be satisfied for the proposed sale to be completed, what filings will be made with the ICC, the expected date for consummation, anticipated effects on employees, the terms of the proposed sale, the process by which purchasers were solicited and the identity of any individual or entity who or which is providing financing for this transaction.

Sincerely

/s/ James A. Fisher  
 James A. Fisher  
 General Chairman U.T.U.  
 GO 787 P&LE RR

## ATTACHMENT

1. No employee of the P&LE Railroad Company who performed compensated service at any time between August 1, 1986 and August 1, 1987 or who was on an authorized leave of absence during that time period, who is represented by this organization shall be deprived of employment or placed in a worse position with respect to compensation or working conditions for any reason except resignation, retirement, death or dismissal for justifiable cause. Failure to relocate shall not be considered as justifiable cause for loss of benefits under this Agreement. The formulae for the protective allowances, with a separation option, shall be comparable to those established in the *New York Dock* conditions.
2. If an employee is placed in a worse position with respect to compensation or working conditions, that employee shall receive, in addition to a make-whole-remedy, penalty pay equal to three times the lost pay, fringe benefits and consequential damages suffered by such employee.
3. P&LE agrees to obtain binding commitments from any purchaser of its rail line operating properties and assets to assume all collective bargaining agreements (including this Agreement) with, and obligations to, P&LE employees who are represented by this Organization to hire P&LE employees in seniority order without physicals, and to negotiate with the P&LE and this Organization an agreement to apply this Agreement to the sale transaction and to select the forces to perform the work over the lines being acquired.

4. Any dispute or controversy over the application or interpretation of this Agreement shall be handled on the property in an expedited manner and may be referred by the employee or this Organization for adjustment in accordance with Section 3, Second of the Railway Labor Act to a Special Board of Adjustment to be established by the Agreement.

**INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,  
IRON SHIPBUILDERS, BLACKSMITHS, FORGERS &  
HELPERS**

Attachment 4

September 8, 1987

Mr. Gordon E. Neuenschwander, President  
Pittsburgh & Lake Erie Railway Company  
Commerce Court  
4 Station Square  
Pittsburgh, Pennsylvania 15219

Dear Mr. Neuenschwander:

In response to your notices to P&LE employees regarding the proposed sale of the P&LE's rail lines, operating properties and certain other assets, this Organization has advised you that it is our position that such a transaction cannot be effected without compliance with provisions of the Railway Labor Act regarding notice, negotiations and maintenance of the status quo pending completion of Railway Labor Act procedures. Additionally, we requested that you provide this Organization with information relating to this transaction.

The proposed sale will obviously affect the working conditions of P&LE employees so in the interest of expediting negotiations, but without prejudice to our position that P&LE had an obligation to serve its own Section 6 notice before entering any agreement for the sale of its rail line and other assets, please consider this letter a Section 6 notice; our proposals are contained in the attachment to this letter. This Organization intends to coordinate its bargaining in this manner with the other Organizations on the property and proposes that a meeting between P&LE and all of the Organizations be held on September 8, 1987; at a mutually agreeable location in Pittsburgh, Pennsylvania.

You have proposed a meeting in early September "in the interests of keeping employees informed of plans for P&LE's future". We are amenable to such a meeting without prejudice to this Organization's position regarding P&LE's obligations under the Railway Labor Act, and suggest that such a meeting be held concurrent with the initial meeting we have proposed for negotiations regarding our proposals.

In order to facilitate our discussions we again request that, in advance of our meeting, you provide us with information regarding this transaction; including, but not limited to, contingencies which must yet be satisfied for the proposed sale to be completed, what filings will be made with the ICC, the expected date for consummation, anticipated effects on employees, the terms of the proposed sale, the process by which purchasers were solicited and the identity of any individual or entity who or which is providing financing for this transaction.

Sincerely,

/s/ A. V. Robey  
A. V. Robey  
International Representative  
Railroad Division

## ATTACHMENT

1. No employee of the P&LE Railroad Company who performed compensated service at any time between August 1, 1986 and August 1, 1987 or who was on an authorized leave of absence during that time period, who is represented by this organization shall be deprived of employment or placed in a worse position with respect to compensation or working conditions for any reason except resignation, retirement, death or dismissal for justifiable cause. Failure to relocate shall not be considered as justifiable cause for loss of benefits under this Agreement. The formulae for the protective allowances, with a separation option, shall be comparable to those established in the *New York Dock* conditions.
2. If an employee is placed in a worse position with respect to compensation or working conditions, that employee shall receive, in addition to a make-whole-remedy, penalty pay equal to three times the lost pay, fringe benefits and consequential damages suffered by such employee.
3. P&LE agrees to obtain binding commitments from any purchaser of its rail line operating properties and assets to assume all collective bargaining agreements (including this Agreement) with, and obligations to, P&LE employees who are represented by this Organization to hire P&LE employees in seniority order without physicals, and to negotiate with the P&LE and this Organization an agreement to apply this Agreement to the sale transaction and to select the forces to perform the work over the lines being acquired.

4. Any dispute or controversy over the application or interpretation of this Agreement shall be handled on the property in an expedited manner and may be referred by the employee or this Organization for adjustment in accordance with Section 3, Second of the Railway Labor Act to a Special Board of Adjustment to be established by the Agreement.

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 87-1745  
Judge Bloch

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Plaintiff,*

v.

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,  
*Defendant.*

SECOND SUPPLEMENTAL AFFIDAVIT OF GORDON E.  
NEUENSCHWANDER

I, Gordon E. Neuenschwander, being duly sworn on oath,  
deposes and states as follows:

1. This affidavit supplements my prior affidavits of September 16 and 21, 1987.
2. The strike by The Pittsburgh and Lake Erie Railroad Company's ("P&LE") unions and the Railway Labor Executives' Association ("RLEA") continues substantially to curtail the operations of P&LE and cause its already precarious financial situation to further deteriorate.
3. Because of the threat by P&LE's unions to spread their picketing to any carriers with interchange freight with P&LE, P&LE's connecting carriers, which are principally Conrail and CSX Transportation, have in fact refused to interchange freight with P&LE. This refusal has cut off P&LE from the nation's rail system.
4. By letter dated September 19, 1987, and received by P&LE on September 21, 1987, Mr. Brian M. Freeman, a consultant in the employ of RLEA, submitted a proposal

on behalf of RLEA for an employee purchase of P&LE's rail assets. The proposal purportedly would match the terms of P&LE's sales agreement with P&LE Railco, Inc. P&LE rejected the proposal on September 22, 1987.

/s/ Gordon E. Neuenschwander  
Gordon E. Neuenschwander

Sworn and Subscribed before me, a Notary Public in and for the County of Allegheny, PA, this 2nd day of October, 1987.

/s/ John D. Hartman  
Notary Public

BEFORE THE  
INTERSTATE COMMERCE COMMISSION  
WASHINGTON, D.C.

Finance Docket  
No. 31121

P&LE RAILCO, INC.—EXEMPTION—ACQUISITION AND  
OPERATION—THE PITTSBURGH AND LAKE ERIE RAIL-  
ROAD COMPANY, and THE YOUNGSTOWN AND SOUTH-  
ERN RAILWAY COMPANY

Finance Docket  
No. 31122

CHICAGO WEST PULLMAN CORPORATION—CONTINU-  
ANCE IN CONTROL EXEMPTION—P&LE RAILCO, INC.  
AND—CONTROL EXEMPTION—THE PITTSBURGH, CHAR-  
TIERS AND YOUGHIOGHENY RAILWAY COMPANY

PETITION FOR RECONSIDERATION  
OF DENIAL OF STAY OF NOTICES OF EXEMPTION

On September 25, 1987, the Railway Labor Executives' Association ("RLEA") filed a request for a stay of the effectiveness of notices of exemption filed in the above-captioned matters relating to the sale of the rail lines, operating properties and certain other assets of the Pittsburgh and Lake Erie Railroad Company ("P&LE"). The Commission served its Decision denying such a stay on September 29, 1987 (referred to herein as "Decision"), concluding that RLEA had not "demonstrated justification for a stay in accordance with the four criteria set forth

in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Decision at 2.

Since the filing of its request for a stay, RLEA, and its attorneys and financial advisors, have had the opportunity to analyze the economic aspects of the underlying transaction, as well as antecedent transaction involving the P&LE. Based upon that analysis RLEA has this day filed a petition for revocation of the exemptions obtained in this matter. RLEA has asserted that the subject transaction will render P&LE insolvent, that it will result in an unfair distribution of P&LE's assets among P&LE's creditors including its employees, and that it is effectively a liquidation and an abandonment of the P&LE in circumvention of the Federal Bankruptcy Act and provisions of the Interstate Commerce Act regarding abandonments. RLEA argues that this evidence will demonstrate that the results of this transaction will be contrary to the National Rail Transportation Policy and that revocation of the exemptions is therefore necessary under 49 U.S.C. §10505(d). In this petition, RLEA will demonstrate that, based upon the evidence and argument contained in its petition for revocation, the Commission should reconsider its denial of the requested stay in effectiveness of the notices of exemption.

Additionally, RLEA will demonstrate that the question of whether the Notices comply with requirements governing historic places and structures is a matter which must be resolved by the Commission prior to completion of the transaction, and not in a subsequent revocation hearing.

Thus, for the reasons stated herein, the Commission should reconsider its decision on the requested stay of effectiveness of the notices of exemption and the stay should be imposed.

Finally, RLEA submits that even if its motion for reconsideration is denied, the Commission's Order should be

amended to conform to its Decision in which it stated that P&LE will be required to maintain its corporate existence pending a revocation proceeding.

## DISCUSSION

### A. Economic Aspects Of This Transaction And Antecedent Transactions

In its petition for revocation of exemptions RLEA sets forth facts which demonstrate that as a result of the proposed transaction P&LE will be rendered insolvent, that the sale of P&LE's rail lines, operating properties and certain other assets constitutes a liquidation and an abandonment of the P&LE in a manner which is inconsistent with controlling law, that the planned distribution of the proceeds of the sale will unfairly favor certain of P&LE's creditors and that the results of the transaction will be to injure employees who made concessions to P&LE in order to keep the railroad in operations. RLEA will not reiterate that discussion here but incorporates it by reference. RLEA also relies on, and incorporates herein, the Declaration of Brian M. Freeman, which is attached to its petition for revocation.

### B. Historic Preservation Issues

The Commission stated that with regard to P&LE's failure to comply with Section 106 of the National Historic Preservation Act of 1966, 16 U.S. §470(f), the ICC stated that it would "consult with appropriate officials in the affected states to ensure the historic integrity of sites and structures 50 years old or older" and that "a stay is therefore not necessary." Decision at 4.

However, Section 106 of the NHPA specifically provides that a federal agency "having authority to license any undertaking shall . . . prior to the issuance of any license . . . take into account the effect of the undertaking on any district, state, building structure or object that is included

in or eligible for inclusion in the National Register (of Historic Places)." Emphasis added.

### C. Labor Stability Issues

The Commission also noted that the transaction has triggered labor unrest and it concluded that "[a] grant of the requested stay would prolong the uncertainty surrounding the fate of the P&LE and also prolong the controversy and attendant disruption in rail service surrounding the sale." Decision at 4. The Commission did not address the possible prolongation of the controversy and attendant disruption of rail service surrounding the sale (including possible disruption of service on connection carriers) if the sale is completed.

## ARGUMENT

### A. The RLEA Has Demonstrated The Necessity For A Stay Under Criteria Governing Such Determination

RLEA submits that the information submitted in this memorandum demonstrates that it has satisfied the four criteria required for a stay and that the Commission should accordingly reconsider its Decision and impose the requested stay.

1. Likelihood of success on the merits. Exemptions under §10505 are permissible only when regulation "is not necessary to carry out the transportation policy of Section 10101a." RLEA's petition for revocation has raised substantial questions as to whether the transaction in this case is consistent with the transportation policies relating to: fostering of "sound economic conditions in transportation" (§10101a(5)), encouraging "honest and efficient management of railroads" (§10101a(10)), encouraging "fair wages and suitable working conditions" (§10101a(12)) and ensuring the availability of accurate cost information in regulatory proceedings (§10101a(14)). RLEA has demonstrated that completion of the proposed sale will render

P&LE insolvent, will unfairly favor the 22 creditors selected by P&LE to the detriment of its other creditors including P&LE's employees and will effectively result in liquidation and abandonment of the P&LE in circumvention of provisions of the Railroad Reorganization provisions of the Bankruptcy Act, 11 U.S.C. §1161, *et seq.*, and the abandonment procedures set forth in 49 U.S.C. §§10903-10905. These matters certainly implicate the transportation policies regarding sound economic conditions in transportation, honest and efficient management of railroads, fair wages and suitable working conditions and the availability of accurate cost information in regulatory proceedings. Accordingly, the facts of this case regarding the results of the proposed sale on P&LE's creditors, employees and the public indicate a substantial likelihood of success on the merits of RLEA's petition for revocation of the exemption of this transaction from regulation on the basis that such regulation is necessary to carry out the rail transportation policy. Accordingly, issuance of a stay is appropriate to preserve that status quo pending resolution of these questions.

Second, while the Commission stated that it would ensure the preservation of the historic integrity of P&LE's sites and structures which are 50 years old or older, the NHPA, §106 explicitly requires that "prior to approval" of a license, federal agencies must take into account the effect on historic sites and structures. The petitions in this case provide no basis for the Commission to perform that function as no information is provided on this matter.

Moreover, RLEA has demonstrated that P&LE Railco, Inc. intends to employ approximately 210 people to perform the work which between 652 and 660 P&LE employees now perform and this will certainly result in a drastic reduction of the number of employees who will maintain the historic structures on the P&LE's rail lines. Affidavit of William E. LaRue, paras 4 and 5, Attachment 3 to RLEA's Petition To Reject Verified Notices Of Ex-

emption And Request For Stay Pending Ruling On Petition To Reject. Thus, the only evidence of record on this matter indicates that there is clearly a need for Commission scrutiny of the impact of this transaction on P&LE's historic structures *prior* to implementation of the proposed sale. Although the Commission's Order provides that the applicants are prohibited from taking action which would jeopardize historic structures, the Commission has not addressed the real concern here which is not that P&LE Railco, Inc. will destroy existing structures but that it will substantially reduce the work force which maintains those historic and prevents them from falling into disrepair. Accordingly, there is a substantial likelihood that RLEA will succeed on the merits of its claim that the petitions should be rejected for failure to comply with requirements relating to historic structures.

Thus, the information presently presented to the Commission demonstrates that there is a strong likelihood that RLEA will succeed on the merits on its challenge to this transaction.<sup>1</sup>

## 2. Irreparable Harm In The Absence Of A Stay

The Commission concluded that RLEA had not demonstrated that the P&LE employees it represents would

<sup>1</sup> Additionally, the Commission stated that RLEA was unlikely to prevail on the argument that the subject transaction is actually governed by Section 11343. Decision at 3, citing *Railway Labor Executives' Association v. ICC*, 819 F.2d 1172 (D.C. Cir. 1987). However, in that case the Commission expressly found that there were sufficient indicia of independence of the acquiring entity from its parent, *Id.* at 1173, and that there was no evidence to suggest that the subsidiary was formed exclusively to elude Section 11343. *Rochester & Southern Railroad, Inc. and Genesee and Wyoming Industries, Inc., Exemption From 49 U.S.C. 10901, 11301 and 11343*, F.D. No. 30779, served July 18, 1986, at 5. In contrast, here RLEA has shown that there is a substantial question as to P&LE Railco's independence from its parent companies since, as a newly formed carrier it does not have \$70 million with which to complete this transaction; and that the transaction was structured deliberately to avoid §1134. Neuenschwander, Tr. at 24-26.

suffer irreparable harm as a result of the stay, citing procedures for revocation of the exemption. Decision at 3. While the Commission assumed that the employees could be made whole following a revocation proceeding, so long as P&LE maintains its corporate existence (*id.*) the facts regarding P&LE's finances adduced in this petition, and RLEA's petition for revocation, demonstrate that the employees could *not* be made whole following a revocation proceeding because the P&LE will be rendered grossly insolvent as a result of the proposed sale. P&LE currently is at best barely able to pay all of its commitments (according to Mr. Neuenschwander, Tr. at 14), and at worst unable to pay all of its commitments in full (*see* Pennsylvania Utilities Commission filing). If the proposed sale is completed it is clear that the P&LE will be unable to pay a large part of its obligations to many of its creditors including its employees. Additionally, as the Declaration of RLEA's financial advisor Brian M. Freeman demonstrates, if the \$70 million in proceeds from the proposed sale are distributed to P&LE creditors it will be legally difficult and practically impossible to recover those monies and restore the status quo.

Moreover, if the Commission exercises its discretion to impose arrangements for the protection of P&LE's employees under §10901, or if the Commission is required to impose such protections in the event it finds that this transaction is actually governed by §11343. It is absolutely clear that the employees will not be able to be made whole following a revocation proceeding. Accordingly, RLEA has demonstrated that P&LE's employees will be irreparably harmed unless a stay is issued.

### 3. Harm To Other Interested Parties

The Commission concluded that issuance of the requested stay would harm P&LE's shippers and creditors. Decision at 4. However, the facts adduced herein, and in RLEA's petition for revocation, demonstrate that in fact

many of P&LE's creditors will be harmed if the proposed sale is effected since P&LE plans to distribute the proceeds of the sale in a manner which will favor certain creditors.

The Commission assumed that the only alternative to the proposed sale was a cessation of operations which would be to the detriment of shippers and P&LE's creditors. However, the Commission did not address the fact that the RLEA had offered an alternative disposition of P&LE's rail lines and assets by arranging for a purchase through an employee stock ownership plan. *See* Affidavit of William LaRue, Attachment 3 to RLEA's Petition For Stay, para. 6. Additionally, in connection with its petition for revocation, the RLEA has supplied the Declaration of its financial advisor, Brian M. Freeman, in which he discusses various alternatives to the sale to P&LE Railco, Inc., including a purchase of the P&LE through an employee stock ownership plan. Mr. Freeman further explains how the employee stock ownership plan would be more likely to maintain the viability of the P&LE. Accordingly, there are alternatives to the proposed sale which would maintain operations and protect shipper and creditor interests. Thus, other interested parties will not be adversely affected by imposition of a stay on the exemptions.

Moreover, it must be recognized that if the exemption is stayed, the P&LE can not simply cease operations and unilaterally liquidate. That can not occur except under the Railroad Reorganization provisions of the Bankruptcy Code, 11 U.S.C. §1161, *et seq.*; under those provisions the rights of all P&LE creditors (not just those selected by P&LE) will be protected as will shippers and the general public. In the event P&LE seeks liquidation under these provision, the employees will again be able to seek to purchase the P&LE and thereby continue operations and preserve the interests of creditors. Furthermore, P&LE can not simply abandon its lines and discontinue service. Under 49 U.S.C. §10903, any such abandonment and discontinuance of ser-

vice must be approved by the Commission. And should the P&LE seek permission to abandon under §10903, the employees could, under 49 U.S.C. §10905, offer to purchase the P&LE and thereby continue operations. Thus, there is no basis for the assumption that granting the requested stay will be injurious to shippers, rather the record before the Commission demonstrates that service will be continued.

Moreover, the Commission seems to have assumed that completion of the sale to P&LE Railco, Inc. will end the disruption of services to shippers which has resulted for employee discontent about the transaction. However, there is no basis for this assumption. In fact, the evidence indicates that completion of the proposed sale will actually escalate employee discontent and result in additional job actions. This could include extension of the job actions to carriers which connect with the P&LE. See *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. —; 95 L.Ed.2d 381 (1987). Thus, contrary to the conclusions of the Commission, there is absolutely no basis for the Commission conclusion that completion of the proposed sale will eliminate the disruption of service on P&LE's lines. Accordingly, the harm to other anticipated by the Commission is without substantial basis.

#### 4. The Public Interest

The Commission concluded in summary fashion that the public interest would be served by allowing the transaction to go forward. However, RLEA has demonstrated herein that if this transaction is completed, creditors will be adversely affected because P&LE will be unable to pay large amounts of debt, the P&LE will circumvent statutory procedures regarding liquidation and abandonments of railroads, the purpose of the National Historic Preservation Act will be thwarted and shippers will suffer continuing

disruptions in service as a result of the dispute between the P&LE and rail labor.

For all of the foregoing reasons, RLEA has satisfied the four criteria governing issuance of a stay, and the Commission should reconsider its Decision and should impose the requested stay.

#### B. Issuance Of Stay Is Required By §106 Of The National Historic Preservation Act

As was noted above, Section 106 of the NHPA expressly requires that the Commission consider the impact of this transaction on the historic structures owned by the P&LE prior to the approval of the lease. It is clear that this requirement can not be satisfied by after-the-fact consideration upon a petition for revocation and subsequent proceedings. Additionally, in this case, RLEA has demonstrated that there is substantial reason to believe that the integrity of the historic structures on the P&LE will not be preserved because the reduction in the work force planned by P&LE Railco will certainly result in a significant decrease in maintenance of those historic structures. Accordingly, the condition attached to the Commission's Order which prevents Railco from taking any action to jeopardize the historic structures is to no effect since it is not destruction of the structures which is at issue but continuation of necessary maintenance.

Thus, even if RLEA did not satisfy the four traditional criteria for issuance of a stay, in this case, a stay is mandated by §106 of the NHPA.

#### C. Even If The Commission Denies RLEA's Motion For Reconsideration It Should Amend Its Order To Require P&LE To Maintain Its Corporate Existence Pending ICC Consideration Of A Petition For Revocation

In its Decision the Commission stated that it would "require P&LE as a condition to effecting this transaction, to maintain its corporate existence until the Commission

has had opportunity to consider a petition for revocation filed within 30 days." Decision at 3. However, no such requirement is reflected in the Commission's Order. *Id.* at 4. Accordingly, even if RLEA's motion for reconsideration is denied the Commission Order should be amended to accord with its Decision.

### CONCLUSION

RLEA's memorandum has demonstrated that the Commission should reconsider its denial of the requested stay of effectiveness in the notices of exemption in this matter, and that the stay should be imposed. But in the event the motion for reconsideration is denied, the Commission should amend its Order to require P&LE to maintain its corporate existence pending the Commission's consideration of a petition for revocation of the exemption.

Respectfully submitted,

/s/ Richard S. Edelman  
John O'B. Clarke, Jr.  
Richard S. Edelman

HIGSAW & MAHONEY, P.C.  
Suite 210  
1050 17th Street, N.W.  
Washington, D.C. 20036  
(202) 296-8500

Date: October 2, 1987

### BEFORE THE INTERSTATE COMMERCE COMMISSION WASHINGTON, D.C.

Finance Docket  
No. 31121

P&LE RAILCO, INC.—EXEMPTION—ACQUISITION AND  
OPERATION—THE PITTSBURGH AND LAKE ERIE RAIL-  
ROAD COMPANY, and THE YOUNGSTOWN AND SOUTH-  
ERN RAILWAY COMPANY

Finance Docket  
No. 31122

CHICAGO WEST PULLMAN CORPORATION—CONTINU-  
ANCE IN CONTROL EXEMPTION—P&LE RAILCO, INC.  
AND—CONTROL EXEMPTION—THE PITTSBURGH, CHAR-  
TIERS AND YOUGHIOGHENY RAILWAY COMPANY

### PETITION FOR REVOCATION OF EXEMPTIONS

Pursuant to 49 U.S.C. §10505(d), the Railway Labor Executives' Association ("RLEA") petitions for revocation of the exemptions granted by the Commission in the above-captioned cases. RLEA submits that revocation of these exemptions is required because all of the circumstances indicate that Commission review of the proposed sale of the Pittsburgh & Lake Erie Railroad's rail lines, operating properties and certain other assets is "necessary to carry out the transportation policy of Section 10101a of [Title 49]." 49 U.S.C. §10505(a)(1).

Since the filing of its request for a stay of the effectiveness of the notices of exemption in these matters (denied on September 29, 1987), the RLEA and its attorneys and financial advisors have had the opportunity to analyze the economic aspects of the underlying transaction, as well as antecedent transactions involving the P&LE. RLEA submits that such analysis reveals that the proposed sale of the P&LE's rail lines, operating properties and certain other assets will render P&LE *insolvent* and that this transaction is in actuality a *liquidation* of P&LE, in an attempt to evade the Railroad Reorganization provisions of the Bankruptcy Code, 11 U.S.C. §1161, *et seq.* and abandonment proceedings by the Commission under 49 U.S.C. §§10903-10905. Moreover, this liquidation is being conducted in a manner which favors particular P&LE creditors to the detriment of others of its creditors, including P&LE's employees.

RLEA submits that this entire process and its results are so clearly contrary to various elements of the National Rail Transportation Policy that Commission review of this transaction is required and that the exemptions relating to this transaction must be revoked.

## DISCUSSION

### A. Economic Aspects Of The Underlying Transaction And Its Antecedents

#### 1. Economic Circumstances Of The Subject Transaction

In testimony presented in the United States District Court for the Western District of Pennsylvania, in an action relating to labor relations matters arising out of the subject transaction, Gordon E. Neuenschwander, President and Chief Executive Officer of the P&LE, stated that the purchase price for P&LE's rail lines, operating properties and other assets involved in the sale was approximately

\$70 million.<sup>1</sup> He further stated that, as a result of the transaction, P&LE will be left with approximately \$2 million in real property and 6,000 rail cars which could be liquidated for between \$30 and \$50 million. Tr. at 15-16. Thus, its total assets following the sale would be between \$102 million and \$122 million. However, Mr. Neuenschwander estimated the P&LE's current liabilities at \$124 million. Tr. at 16. Moreover, as of December 31, 1986, according to a financial statement filed with the Pennsylvania Public Utilities Commission, P&LE had total assets of \$189,000,000, total liabilities of \$168,830,000 and cumulative preferred stock of \$25,125,000. Thus, at the time, P&LE had a net negative capital of approximately \$4 million. Additionally, P&LE sustained a net operating loss of \$8,133,122 and an after tax loss of \$17,800,296.<sup>2</sup>

On the basis of this information RLEA submits that the P&LE was and is insolvent. Mr. Neuenschwander testified that he believes that P&LE is not currently insolvent (Tr. at 14) but admitted that as a result of the subject transaction P&LE would be rendered insolvent (Tr. at 16). In fact the proposed transaction would create a large gap between P&LE's assets and liabilities. As was noted above, as of December 31, 1986, P&LE had liabilities of \$168,830,000 while Mr. Neuenschwander claimed that currently P&LE's debt is approximately \$124 million (Tr. at 16). Under Mr. Neuenschwander's own appraisal, upon completion of the transaction the gap between P&LE's assets and liabilities will be between \$2 million and \$22

<sup>1</sup> See p. 15 of the Transcript of that testimony, a copy of which is included with RLEA's Petition to Reject Verified Notices of Exemption And Request For Stay Pending Ruling On Petition To Reject as Attachment 2. Citations to that transcript will be referred to herein as "Tr. at —."

<sup>2</sup> A copy of the financial statement filed by P&LE with the Pennsylvania Utilities Commission is included with RLEA's Petition To Reject Verified Notices Of Exemption And Request For Stay Pending Ruling On Petition To Reject as Attachment 1.

million; if P&LE has not actually reduced its debt from December 31, 1986 levels, the gap would be far larger.

## 2. Previous Transactions

### a. The 1979 Transaction

In May of 1979, PLECO, which was formed by several entrepreneurs and P&LE officers for the purpose of acquiring the P&LE, initiated a two-step leveraged buyout transaction in order to acquire exclusive ownership of P&LE (the "1979 Transaction"). The facts relating to that transaction are fully set forth, in detail, in *Bertram Field and Edward Fanucchi v. Allyn, et al.*, 457 A.2d 1089 (Ch. Ct. Del. 1983) in which two of the P&LE's shareholders challenged that transaction. PLECO purchased 92.6% of the common stock of the P&LE from Penn Central Transportation Corporation ("Penn Central") for approximately \$60 million or \$90.25 per share. As the second step of the 1979 Transaction, PLECO tendered for the remaining minority shares at \$115 per share, an amount exceeding the fair value of such stock. Pursuant to the tender offer and a statutory cash-out merger under Delaware law, PLECO acquired the remaining shares of P&LE from the minority shareholders at a price in excess of fair value.

PLECO effected the 1979 Transaction of P&LE with 100% financing, secured by the assets of P&LE. Initially, PLECO obtained a bridge loan of \$50 million from First National Bank of Boston ("FNBB"), secured by the stock of PLECO. Upon the acquisition of 100% of the stock of P&LE, PLECO arranged for P&LE to enter into a 10 year sale-leaseback of P&LE's unencumbered assets. P&LE received \$60 million from FNBB for which it was obligated for a period of 10 years to make rental payments of \$6 million annually with interest to FNBB. P&LE, upon receiving the \$60 million payment from FNBB, from the sale-leaseback arrangement, declared and paid a dividend of \$60 million to PLECO, its exclusive shareholder which,

in turn, applied that sum to repay FNBB for the bridge loan.

P&LE received nothing of value from the 1979 Transaction. Instead, virtually all of P&LE's capital was eliminated, having pledged most of its assets to finance the buyout for the benefit of PLECO and Penn Central. Whereas P&LE had approximately \$169.5 million in book value prior to the 1979 Transaction, it had \$15 million in book value remaining after its completion. One other result of all of these financial maneuvers was that several P&LE officers, including current P&LE President Neuenschwander, who purchased between 160 and 255 shares of PLECO at \$1 per share became owners of significant assets of the P&LE (e.g., Mr. Neuenschwander, who purchased 160 shares of PLECO for \$160 at its formation, became an 8.4% shareholder of the PLECO which owned the assets of the P&LE).

### b. The 1985 Transaction

In May 1985, because of a number of factors including continuing losses, P&LE was approximately \$60 million in arrears on its contractual debt obligations. P&LE entered into a debt reorganization plan with some of its creditors. As part of that transaction, the creditors involved extended the repayment period of outstanding debt, and received an issue of 10% cumulative preferred stock in exchange for accrued but unpaid interest on existing debt obligations. Said creditors were also granted the right to disapprove any sale, lease or transfer, or dissolution or liquidation of P&LE. See, *The Pittsburgh & Lake Erie Railroad Co.-Preferred Stock*, Finance Docket No. 30677, served August 2, 1985. RLEA believes that the evidence shows that P&LE was insolvent at the time of that transaction.

As part of the 1985 Transaction, P&LE's employees made a variety of concessions in order to support the railroad. Mr. Neuenschwander testified that one of the

labor organizations agreed to a reduction in the work week from five days to four days and other organizations agreed to reductions in wages. Neuenschwander Tr. at 21-22.

### c. The 1986 Transaction

In 1986, Beloit Corporation, as a majority shareholder of PLECO, sold all of its stock holdings to PLECO and other management shareholders on terms not publicly available. As a result of this transaction P&LE's officers and other individual shareholders owned all of the P&LE. RLEA believes that at the time of the 1986 Transaction, P&LE, as the principal asset of PLECO, was insolvent. RLEA believes that the assets of P&LE were further encumbered by the terms of the 1986 Transaction without fair consideration being paid to P&LE to the substantial detriment of its creditors.

### B. Cumulative Results Of The Various Transactions

The current owners of PLECO obtained their interests in the railroad through a highly leveraged buy-out of P&LE using P&LE's assets as collateral for their financing. In subsequent transactions, the capital of P&LE was used to maintain or increase control of PLECO.

P&LE suffered various financial setbacks in the last several years which resulted in a restructuring of its debt with the assumption of increased financial obligations and the successful negotiation of pay concessions from its employees. Citing continued bad fortune, PLECO now seeks to sell P&LE's rail lines, operating properties and certain of its assets. And it now seeks Commission sanction of the sale.

The subject transaction is effectively a liquidation of the P&LE; upon completion of the sale, its remaining assets will be approximately \$2 million in real property and 6,000 rail cars valued at between \$30 million and \$150 million. P&LE has admitted that the proposed transaction would render P&LE insolvent by between \$2 million and \$22

million. RLEA submits that the difference between assets and liabilities will be much greater. Additionally, in the hearings in the district court, Mr. Neuenschwander stated that the proceeds of the transaction will be distributed among 22 principal creditors. Those creditors will thereby receive preferential treatment of their claims to the detriment of P&LE's other creditors including its employees. And the owners of PLECO will have obtained a liquidation and abandonment of the P&LE without compliance with applicable procedures under the Bankruptcy Act and the Interstate Commerce Act.

As for the employees who made concessions to keep P&LE in operation, all of them will be released (Neuenschwander Tr. at 13). RLEA believes that P&LE's purchaser will only employ approximately 210 people.<sup>3</sup> Of course following distribution of the proceeds of the sale, there will not be sufficient assets for P&LE to pay its employees claims as creditors.

### C. Alternatives

RLEA recognizes that P&LE has had its financial difficulties; indeed as was noted above, P&LE's employees made concessions in order to help the P&LE out of its problems. However, there were, and are, alternatives to the sale to P&LE Railco, Inc. which could continue rail operations on P&LE's lines. RLEA submits for Commission consideration the Declaration of Brian M. Freeman, its financial advisor, in which he discusses various alternatives, including voluntary or involuntary reorganization (under Chapters 11 or 4 of the Federal Bankruptcy Act) and the purchase of the P&LE through an employee stock ownership plan. Freeman Declaration para. 4. Mr. Freeman further explains how the employee stock ownership

<sup>3</sup> See Declaration of William E. LaRue, para. 4, which was included in RLEA's Petition To Reject Verified Notices Of Exemption And Request For Stay Pending Ruling On Petition To Reject as Attachment 3.

plan offered by the RLEA would be more likely to maintain the viability of the P&LE. Freeman Declaration para. 4.a.ii. Thus, although is in financial difficulty, there are alternatives to the sale of P&LE to P&LE Railco, Inc.

### ARGUMENT

The exemptions from prior Commission approval of the subject transactions under 49 U.S.C. §10901 were obtained pursuant to 49 U.S.C. §10505. However, §10505(a)(1) permits an exemption only when regulation is not necessary to carry out the transportation policy of Section 10101a. RLEA submits that the information submitted in this petition demonstrates that Commission review of this transaction is necessary to carry out the rail transportation policies relating to: fostering of "sound economic conditions in transportation" (§10101a(5)), encouraging "honest and efficient management of railroads" (§10101a(10)), encouraging "fair wages and suitable working conditions" (§10101a(12)) and ensuring the availability of accurate cost information in regulatory proceedings (§10101a(14)). Accordingly, the exemptions should be revoked and the Commission should initiate proceedings on this matter.

RLEA has demonstrated that the subject transaction is merely the last of a series of transactions in which the owners of PLECO first obtained control of the P&LE by progressively utilizing the assets of the P&LE and that its owners now seek to liquidate the P&LE in a manner which would prefer 22 of its creditors. It is clear that the effect of this transaction is to liquidate the P&LE without proceedings under the Railroad Reorganization provisions of the Bankruptcy Code, 11 U.S.C. §1161, *et seq.* or proceedings before the Commission for abandonment pursuant to 49 U.S.C. §§10903-10905. Commission review of this transaction is necessary to prevent circumvention of these two processes which are designed to protect creditors, employees and the public. RLEA submits that the results of the subject transaction are inconsistent with the trans-

portation policies concerning sound economic conditions in transportation, honest and efficient management of railroads and the availability of accurate cost information in regulatory proceedings, accordingly, Commission review under §10901 is therefore necessary.

It is also apparent that completion of this transaction will do great injury to P&LE's employees who made concessions to keep the railroad operating. This would be inconsistent with the transportation policy concerning maintenance of fair wages and suitable working conditions. Furthermore, should the commission permit this transaction to go forward it will send a message to rail labor that will certainly diminish the willingness of employees to make concessions in the future, which result would not promote the National Rail Transportation Policy.

Moreover, Commission review of this entire matter is also necessary in order that it may consider all of the alternatives to the sale to P&LE Railco, Inc. RLEA has previously advised the Commission that it has offered P&LE an alternative disposition of its rail lines and assets by arranging for a purchase through an employee stock ownership plan. *See* Declaration of William E. LaRue, para. 6, which is attached to RLEA's Petition to Reject Verified Notices Of Exemption And Request For Stay Pending Ruling On Petition to Reject. In a declaration in support of this petition, Brian M. Freeman, financial advisor to the RLEA, discusses alternatives to the proposed sale which are available, including purchase by its employees through an employee stock ownership plan, the financial problems which would occur if the transaction and distribution of the proceeds or the sale are completed, the difficulty of exploring other alternatives once the sale and distribution of the proceeds of the sale are completed and how the RLEA's offer would create a railroad which is more financially viable than P&LE, Railco, Inc. The alternatives should be explored by the Commission before revocation will be rendered in effective.

**CONCLUSION**

Accordingly, for all of these reasons, the exemptions in these matters should be revoked and the Commission should review this entire matter.

Respectfully submitted,

/s/ Richard S. Edelman  
John O'B. Clarke, Jr.  
Richard S. Edelman  
HIGSAW & MAHONEY, P.C.  
Suite 210  
1050 17th Street, N.W.  
Washington, D.C. 20036  
(202) 296-8500

Date: October 2, 1987

**BEFORE THE  
INTERSTATE COMMERCE COMMISSION  
WASHINGTON, D.C.**

**Finance Docket  
No. 31121**

P&LE RAILCO, INC.—EXEMPTION—ACQUISITION AND  
OPERATION—THE PITTSBURGH AND LAKE ERIE RAIL-  
ROAD COMPANY, and THE YOUNGSTOWN AND SOUTH-  
ERN RAILWAY COMPANY

**Finance Docket  
No. 31122**

CHICAGO WEST PULLMAN CORPORATION—CONTINU-  
ANCE IN CONTROL EXEMPTION—P&LE RAILCO, INC.  
AND—CONTROL EXEMPTION—THE PITTSBURGH, CHAR-  
TIERS AND YOUGHIOGHENY RAILWAY COMPANY

**DECLARATION OF BRIAN M. FREEMAN**

District of Columbia                    )                   ss:

BRIAN M. FREEMAN, being duly sworn, deposes and  
says:

1. I am the Chairman of Brian M. Freeman & Co., Inc.  
("Freeman & Co."), which since 1983 has served as fi-  
nancial advisor to employee benefit plans, fiduciaries and  
numerous other entities. A more complete description of  
Freeman & Co.'s qualifications and experience is contained  
in Exhibit 1 hereto.

2. I received a B.A. in Economics *summa cum laude* in  
1967 from Rutgers University, a J.D. *cum laude* in 1970

from Harvard Law School, an L.L.M. in Taxation in 1972 from New York University, and an M.B.A. in 1975 from Harvard Business School. I was a tax associate at a major law firm in New York City from 1971 to 1973. I served in the United States Department of the Treasury from 1976 to 1981, as Executive Director and Secretary to the Chrysler Corporation Loan Board, Secretary to the Emergency Loan Guarantee Board, Deputy for Corporate Finance and Special Projects, and Financial Counselor to the General Counsel. Since leaving government service, I have been extensively involved in financial transactions and negotiations in the transportation industry, including transactions involving Eastern Air Lines, Republic Airlines, Western Airlines, Trans World Airlines, and Consolidated Rail Corporation. A fuller description of my background and experience is also contained in Exhibit 1.

3. This firm is the financial advisor to the Railway Labor Executives' Association ("RLEA") with respect to a number of matters, including the proposed acquisition and operation (the "Proposed Acquisition") of The Pittsburgh and Lake Erie Railroad Company, and the Youngstown and Southern Railway Company (collectively referred to as the "P&LE") by P&LE Railco, a newly incorporated subsidiary of Chicago West Pullman Corporation ("CWP"). As such, we are generally familiar with the operations and financial status of the P&LE, and the Proposed Acquisition by which P&LE assets would be acquired by P&LE Railco. In fact, on behalf of the RLEA for the benefit of the employees, we submitted a proposal to purchase the P&LE for the employees through an ESOP ("ESOP Proposal"), which was rejected by the P&LE.

4. In my opinion and best judgment based upon the facts that are in the record and upon information and belief:

a. The Proposed Acquisition is not necessarily the only possible transaction for the P&LE to continue operations and increase its viability.

There are alternative transactions which are more likely to provide greater continued rail service for a longer period. These other transactions include, but are not limited to (1) a restructuring by the P&LE of both its creditor obligations and its labor contract, or (2) an employee purchase of the railroad through an ESOP.

#### i. Restructuring

Such a restructuring is implementable and is a better alternative. The creditor claims could be restructured on a consensual basis through negotiation or on an involuntary basis through a Chapter 11 or Chapter 4 proceeding under The Federal Bankruptcy Act. The labor contracts could be restructured on a voluntary basis; this would be achievable if made available as an alternative, on the same rationale which resulted in the RLEA's authorizing the ESOP proposal that we made for it.

A restructuring would have been a better alternative because it would have made greater resources available for ongoing operations. Resources to be transferred to the P&LE creditors under the Proposed Acquisition would remain with the company and new obligations created by the Proposed Acquisition would be avoided. The sale to P&LE Railco is fundamentally inequitable and at the expense of the employees.

#### ii. ESOP

Likewise, the ESOP Proposal, which was made under the authority of the RLEA on behalf of the P&LE's employees, is even more likely to maintain short- and long-term viability of the P&LE at the same or at a higher price than the Proposed Acquisition by P&LE Railco standing alone and/or in combination with a restructuring for a number of reasons.

a. Cash flow would be enhanced by the nature of the EOPS structure:

(1) The ability to repay acquisition debt in pre-tax dollars rather than after-tax dollars.

(2) A reduced interest rate available to ESOP acquisition debt as a result of the tax exemption for half of the interest earned by financial institutions on loans to ESOPs.

(3) The continued availability of the net operating loss carryovers ("NOLs") of at least \$90 million in a sale to an ESOP. NOLs are more likely to be foregone or of limited availability in the acquisition of the enterprise or its assets by any other company or investor such as P&LE Railco.

b. Employees require a lower return on their investment than outside investors because the ESOP's objectives would include the protection of jobs to the extent economically justified after other actions are taken.

c. Potential liabilities from employee and other claims arising from the Proposed Acquisition would be greatly reduced.

d. Employees would have greater incentive to assure viability through wage rate reductions, work rule changes, and other actions since they would own the company.

5. If the Proposed Acquisition is implemented, the sale can not be undone as a procedural matter; thus, its implementation would preclude other alternatives including a return to the status quo even if the exemption can be revoked.

a. If the \$70 million proceeds from completion of the Proposed Acquisition are disbursed to the P&LE creditors, it would be legally difficult, and practically impossible, to retrieve the funds disbursed in a manner that permits the P&LE to be restored to the status quo.

b. Furthermore, substantially all of the \$70 million purchase price appears that it would be financed initially or ultimately by P&LE Railco borrowing against the acquired

assets of the P&LE. The existence of these liens or, if none, the related creditor's claims against the acquired assets, would preclude or impair implementation of any other transaction including an ESOP buyout.

c. There is nothing in the formal record to support the assertion that the P&LE actually would be liquidated absent immediate approval of the Proposed Acquisition. Moreover, if the Proposed Acquisition is stayed, the P&LE could consider other alternatives, including the ESOP Proposal. The period of the stay would be adequate for such consideration, and would likely occur in any case since the P&LE would have to obtain ICC permission to cease railroad operations, if it decided to cease operations and liquidate, a process that could take several months. The agreement employees could assure continuation of those operations thereafter.

d. The P&LE would not be viable after the Proposed Acquisition based on our analysis and on its own President's statements. The Proposed Acquisition will create employee contingent liabilities and other claims, including creditor fraudulent conveyance claims, further adding to the liabilities of the P&LE. Since the P&LE would have insufficient assets to satisfy its creditor liabilities after the Proposed Acquisition, the railroad most likely will seek or will be forced into a bankruptcy proceeding and/or a liquidation.

f. The primary benefit of the Proposed Acquisition, therefore, is not continued rail service but the aggrandizement of certain creditors of P&LE. The primary and only economic justification and potential benefits of the Proposed Acquisition derive primarily and substantially, and perhaps completely, from circumventing the P&LE's existing obligations to its employees under its labor contracts in order to prefer a class of approximately 22 creditors over the employees' protection agreements. Circumventing P&LE's labor contracts and protection

agreements provides substantially the only basis for the purchase price, the proceeds of which will be applied to pay off certain creditors. Other economic benefits, if any, are speculative, marginal, and achievable either independently or with the cooperation that the agreement employees could provide even if the Proposed Acquisition does not occur.

g. There were and remain other additional alternatives available which are more consistent with the public interest and the employee interests, which do not raise the potential risks and policy problems that the Proposed Acquisition has created. The primary alternatives are restructuring and the proposed RLEA employee transaction, both of which would increase long-term prospects for continued operations. In particular, there are strong arguments in favor of the ESOP, because the employees would accept a lower rate of return than normal sources of venture capital, and the would make greater concessions.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on October 2, 1987.

/s/ Brian M. Freeman  
Brian M. Freeman

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT  
OF PENNSYLVANIA

Civil Action  
No. 87-1745

(Judge Bloch)

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Plaintiff,*

v.

PITTSBURGH & LAKE ERIE RAILROAD CO.,  
*Defendant,*

DECLARATION OF WILLIAM E. LaRUE

William E. LaRue hereby declares under penalty of perjury pursuant to 28 U.S.C. §1746 that the following is true and correct:

1. Declarant is a Vice President of the Brotherhood of Maintenance of Way Employees (BMWE) and has held that elective position since June 1, 1980. At all times material hereto, declarant was, and is still, assigned to represent the brotherhood and its members' interests in connection with railroads in the Northeast section of this Country, including the interests of those members who are employed by the Pittsburgh & Lake Erie Railroad Company (P&LE). Declarant is also the co-spokesman for the Railway Labor Executives' Association's (RLEA) coordinating committee for rail labor's strike against the P&LE. As a result of performing his duties for the BMWE and RLEA, Declarant is personally familiar with the facts set forth in this Declaration.

2. Following the first injunction hearing, the P&LE met with rail labor on September 18 and 19, 1987, to "discuss" the effects of the sale on P&LE employees. At the first meeting, representatives for the P&LE stated that RLEA's attorney had mentioned that the unions had a proposal to buy the P&LE and they wanted to know if that was true, and if true, they would like to see that proposal. Declarant contacted RLEA's officials and on September 20, 1987 was furnished with an ESOP proposal which Declarant understands was received by the P&LE at least by September 21. At the meetings on September 18 and 19, rail labor sought to negotiate about the impact of the sale on P&LE employees, but the P&LE representatives stated that they were more interested in the ESOP proposal. However, the P&LE did make a proposal similar to that described in paragraph 6 below.

3. On September 19, 1987, Mr. James D. Peters, P&LE's Director of Labor Relations, informed rail labor that the P&LE had not obtained an extension of the sale date. Rail labor then recommenced its strike, and the P&LE cancelled the meeting which had been scheduled for September 20.

4. In light of the P&LE's representations in Court on September 21 that it was willing to meet over the effects of the sale on employees, Declarant caused a telegram to be sent to Mr. Peters and to Mr. Gordon Neuenschwander informing them that Rail Labor was willing to meet at any time; Declarant also asked whether the September 25 meeting would be held. A true and accurate copy of that telegram is attached hereto as LaRue Exhibit No. 1.

5. The carrier responded and the parties met on September 23. At that meeting, Declarant asked about the P&LE's response to the ESOP proposal, and the P&LE replied by reading Mr. Neuenschwander's letter of September 22, 1987 rejecting the ESOP proposal. That letter was subsequently

furnished to Declarant; a true and accurate copy of that letter is attached hereto as LaRue Exhibit No. 2. Rail labor responded by proposing a separation allowance for all employees to be affected by the sale. The meeting recessed with rail labor agreeing to submit a written proposal as soon as possible; also, a further meeting was scheduled for September 25.

6. At about 4:00 p.m. on September 24, Declarant caused a written proposal to be submitted to the P&LE and at 10:00 a.m. on September 25, the parties met to discuss that proposal. At that meeting, Mr. Peters said that he had no authority to agree to the kind of money involved in rail labor's proposal and, when asked what "kind of money" he did have authority to propose, he replied that it was so small, it wasn't worth talking about. Mr. Peters, however, proposed that the P&LE was willing: (1) to pay unused vacation for 1987 and 1988, as rail labor submits it is required to do by contract; (2) to continue the Health and Welfare insurance payments for three months, again as rail labor submits its current obligations require; (3) to help employees obtain instructions on how to obtain employment; (4) to attempt to establish a medical insurance plan which would be paid by the employees; (5) to continue to provide employment verification as it has done in the past; and (6) to pay the employees who do not receive P&LE Railco jobs pay for the five (5) remaining holidays in 1987. That proposal was similar to that advanced on September 18, but with a few modifications.

7. Declarant, in an attempt to find a basis upon which meaningful negotiations could begin, asked the union representatives to describe to the P&LE various stabilization agreements (agreements which require continued employment or its equivalent in pay) to which the P&LE is a party, as well as similar agreements or arrangements on other carriers. When a twenty-five thousand (\$25,000) dollar buyout was suggested as a way to resolve the existing dispute, Mr. Peters

replied that he did not have authority to do anymore than what the P&LE had proposed and that it would serve no purpose even to discuss other concepts. Declarant replied by asking that the carrier's proposal be placed in writing and the meeting recessed around 12:00 to 12:30 p.m., with the talks to resume at 6:00 p.m. that day (i.e., September 25).

8. Around 4:00 to 5:00 p.m., the carrier submitted its written proposal, but at 5:30 p.m. Mr. Peters called Declarant and stated that the carrier wished to postpone the 6:00 p.m. meeting. Declarant declined to adjourn the meeting as Mr. Peters requested, but agreed to postpone it for thirty (30) minutes. At 6:30 Mr. Peters again called Declarant and stated that the carrier was waiting to see what the Interstate Commerce Commission (ICC) did with a pending request by RLEA for a stay of the ICC exemption which would enable P&LE Railco to purchase the P&LE's assets. (That stay request was denied at 10:00 p.m. on September 25.) At 7:00 p.m., Mr. Peters called Declarant again, but this time cancelled the meeting. Mr. Peters stated that there was no reason to meet since the ICC had not ruled on the stay. As Mr. Peters explained, the ICC's ruling, in the P&LE view, would have a bearing on future meetings with rail labor.

9. On September 28, Declarant was informed by a news reporter that the P&LE was making a new offer, and Declarant called Mr. Peters to see if that were true. Mr. Peters informed Declarant that there was no new proposal and no further meetings were scheduled. On September 30, Declarant again called Mr. Peters and asked if the carrier was willing to meet; Mr. Peters replied he would have to get back to Declarant after he checked with his superiors. Two days later, on October 2, Declarant again called Mr. Peters and asked him several questions, including whether the carrier was willing to meet. Mr. Peters stated that he was not sure whether there would be any further meetings. Around 3:00 p.m. on October 2, Declarant caused a telegram to be

sent to the P&LE reiterating that the unions were willing to meet with the P&LE at any time.

10. Around 9 or 10 a.m. on October 5, Declarant and Mr. Peters spoke by phone about one of the questions which Declarant had raised on October 2; during that conversation, Mr. Peters did not mention that the carrier had any plans to meet with rail labor. At 6:00 p.m. on October 5, Declarant received a telegram from Mr. Peters acknowledging Declarant's telegram of October 2 and offering to meet at 10:00 a.m. on October 7. A true and accurate copy of that P&LE telegram is attached hereto as LaRue Exhibit 3. On October 6, Declarant advised Mr. Peters that rail labor was willing to meet on the 7th.

11. Declarant has been involved in negotiating rail labor contracts since the mid 1970's and states that in his opinion the P&LE has not made, and is not making, a reasonable or good faith effort to resolve the dispute over the impact of the sale on P&LE employees. Declarant's opinion is based on his experience as a negotiator and on the fact that it is not acting in good faith to send a person in to negotiate who does not have the authority to negotiate anything other than what the carrier first offered. This is especially true here, where this sale will have such a drastic impact on all existing working conditions and agreements. Declarant can, and, indeed, rail labor has, placed numerous proposals on the bargaining table in an attempt to resolve this dispute, but Mr. Peters has replied that he does not have the authority to discuss anything other than what was first proposed by the P&LE. In Declarant's opinion, that is not making reasonable efforts to settle this dispute by negotiations.

I DECLARE UNDER PENALTY OF PERJURY THAT  
THE FOREGOING IS TRUE AND CORRECT.

Executed on October 7, 1987.

/s/ William E. LaRue  
WILLIAM E. LaRUE

## WESTERN UNION MAILGRAM

BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES  
ATTN W LARUE  
342 OLIVIA ST 2 FLOOR  
MCKEES ROCKS PA 15136

THIS IS A CONFIRMATION COPY OF THE FOLLOWING  
MESSAGE:

4123311166 FRB TDMT MCKEES ROCKS PA 63 09-21 0858P  
EST  
PMS J D PETERS DIRECTOR LABOR RELATIONS RPT DLY  
MGM, DLR  
PITTSBURGH AND LAKE ERIE RAILROAD CO COM-  
MERCE CT 4 STATION SQ  
PITTSBURGH PA 15219

THIS IS TO NOTIFY YOU THAT THE 14 RLEA UNIONS  
ARE PREPARED TO MEET AT ANY TIME WITH A REA-  
SONABLE NOTICE. FURTHER PLEASE ADVISE IF YOU  
ARE STILL INTENDING TO MEET ON FRIDAY SEPT-  
MBER 25 1987 AT THE INTERNATIONAL HOST AT PITTS-  
BURGH AIRPORT AT 10:00 AM. KINDLY ADVISE WILLIAM  
LARUE SPOKESPERSON RLEA COORDINATING COMMIT-  
TEE 342 OLIVIA STREET 2 FLOOR MCKEES ROCKS PA  
15136

WILLIAM LARUE  
342 OLIVIA ST 2 FLOOR  
MCKEES ROCKS PA 15136

20:56 EST

MGMCOMP

## WESTERN UNION MAILGRAM

B MAINTENANCE  
342 OLIVIA ST 2 FLOOR  
MCKEES ROCK PA 15136

THIS IS A CONFIRMATION COPY OF THE FOLLOWING  
MESSAGE:

4123311166 FRB TDMT MC KEES ROCK PA 61 09-21 0847P  
EST  
PMS GORDON E NEUENSCHWANDER, PRESIDENT PITTS-  
BURGH AND LAKE ERIE  
RAILROAD CO, DLR  
COMMRCE COURT 4 STATION SQUARE  
PITTSBURGH PA 15219

THIS IS TO NOTIFY YOU THAT THE RRLEA UNIONS ARE  
PREPARED TO MEET AT ANY TIME WITH A REASON-  
ABLE NOTICE FURTHER PLEASE ADVISE IF YOU ARE  
STILL INTENDING TO NEGOTIATE ON FRIDAY SEPT-  
MBER THE 25 1987 AT THE INTERNATIONAL HOST AT  
PITTSBURGH AIRPORT AT 10AM KINDLY CONTACT WIL-  
LIAM LARUE SPOKE PERSON 342 OLIVIA ST SECOND  
FLOOR MCKEES ROCK PA PHONE 412-3311165

WILLIAM LARUE SPOKE PERSON RRLEA COORDINAT-  
ING COMMITTEE  
342 OLIVIA ST 2 FLOOR  
MCKEES ROCK PA 15136

20:45 EST

MGMCOMP

THE PITTSBURGH & LAKE ERIE  
RAILROAD COMPANY

September 22, 1987

Mr. Brian M. Freeman  
Brian M. Freeman & Co., Inc.  
1777 F Street, N.W.  
Washington, D. C. 20006

Dear Mr. Freeman:

Yesterday morning I received your proposal on behalf of the RLEA dated September 19, 1987 for an Employee purchase of the rail operations of the P&LE. While your proposal might have received serious consideration under other circumstances, the P&LE is not in a position to entertain your proposal or enter into any negotiations concerning it because P&LE is bound by contract to sell its rail lines and other operating assets to a newly-formed subsidiary of Chicago West Pullman. Under that contract the purchaser has the right to acquire the same rail lines and other operating assets of the P&LE which are the subject of your proposal. You must appreciate that the P&LE intends to honor its agreements involving such an important transaction.

Thank you for your interest in this matter.

Very truly yours,

/s/ Gordon E. Neuenschwander

WESTERN UNION MAILGRAM

WILLIAM LARUE, CHAIRMAN, RLEA COORDINATING  
COMMITTEE  
342 OLIVIA ST 2ND FLOOR  
MCKEES ROCKS PA 15136

THIS IS A CONFIRMATION COPY OF A TELEGRAM ADDRESSED TO YOU:

THIS WILL ACKNOWLEDGE RECEIPT OF YOUR TELEGRAM DATED OCTOBER 2, 1987.

I DISAGREE WITH YOUR CHARACTERIZATION OF THE EVENTS SUBSEQUENT TO OUR LAST MEETING ON SEPTEMBER 25, 1987. OUR JOINT MEETINGS ON THE EFFECTS OF THE SALE OF PNLE'S ASSETS ON THE EMPLOYEE WERE RECESSED ON SEPTEMBER 25, 1987 PENDING RECEIPT OF THE ICC DECISION ON PNLE-RAILCO'S FILING FOR EXEMPTION. UPON RECEIPT OF THE ICC'S SEPTEMBER 29TH DECISION CARRIER WAS STUDYING IT'S EFFECT ON OUR MEETINGS. WE SUBSEQUENTLY LEARNED THAT CWP WAS MEETING WITH RLEA AND FELT THAT FURTHER MEETINGS SHOULD BE DELAYED PENDING THE OUTCOME OF THE CWP-RLEA MEETING.

SINCE YOU APPARENTLY DESIRE TO CONTINUE OUR MEETINGS REGARDLESS OF THE OUTCOME OF THE CWP-RLEA MEETING WE HAVE ARRANGED TO MEET WITH YOU AT 10AM ON WEDNESDAY, OCTOBER 7, 1987 IN THE HUNT ROOM, DAYS INN-REDWOOD, BANKSVILLE ROAD PITTSBURGH PA. PLEASE ADVISE THAT YOU WILL ATTEND.

JAMES D PETERS - DIRECTOR LABOR RELATIONS  
PITTSBURGH AND LAKE ERIE RAILROAD  
COMMERCE CT 4 STATION SQUARE  
PITTSBURGH PA 15219  
COMMERCE CT 4 STATION SQUARE

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 87-1745

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Plaintiff,*

v.

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,  
*Defendant.*

THIRD SUPPLEMENTAL AFFIDAVIT  
OF JAMES D. PETERS

I, James D. Peters, being duly sworn on oath, depose and state as follows:

1. I am Director, Labor Relations, for The Pittsburgh and Lake Erie Railroad Company ("P&LE"). In this position, I have participated in meetings with P&LE's unions concerning the effects of the sale of P&LE's rail assets.
2. I have read the Declaration of William E. LaRue in support of the Railway Labor Executives' Association ("RLEA") Opposition to P&LE's Renewed Motion for a Temporary Restraining Order and Preliminary Injunction. The purpose of this supplemental affidavit is to correct serious omissions and errors in Mr. LaRue's characterizations of meetings between P&LE and representatives of its unions.
3. As Mr. LaRue states, P&LE met with rail labor on September 18 and 19, 1987 to discuss the sale. Contrary to his representation, P&LE was not interested in a union proposal to purchase the P&LE through an ESOP. I understood RLEA's counsel to have previously stated that the unions had a proposal to "save" the P&LE. I simply asked what that proposal was and was told that it was

an ESOP proposal for employee ownership of the P&LE. As Mr. LaRue admits, P&LE stated it was willing to address certain effects of the sale.

4. P&LE and union representatives next met on September 23, 1987 to address the effects of the sale. Mr. LaRue fails to note that at that meeting P&LE presented a proposal to address the effects of the sale.

5. P&LE's unions submitted a written effects proposal on September 24, 1987. A true and correct copy of this proposal is attached as Exhibit 1. This document proposed, inter alia, a \$45,000 per employee severance allowance for each employee on P&LE's rosters, which would include employees who have been on furlough for as long as five years. P&LE currently has approximately 1,600 unionized employees on its rosters, of whom approximately 650 are active. This feature alone of the unions' proposal would cost \$72 million, or more than the sales price for P&LE's rail assets.

6. The meeting on effects was continued on September 25, 1987. At that meeting, I did not state that the dollar amount of severance allowances I was authorized to propose "was so small, it wasn't worth talking about." (LaRue Declaration at paragraph 6). I stated that the amount I may be able to get authority for would probably be considered insignificant compared with the \$45,000 per employee they had then proposed.

7. Contrary to Mr. LaRue's statement (paragraph 7), I never understood the union group to propose a \$25,000 per person buy-out at the September 25 meeting. One union did state its position that it was entitled to \$25,000 per person severance under existing agreements. However, when I asked whether the statements by the individual unions referenced by Mr. LaRue could be in the form of written proposals, I was told that there were no individual proposals, only the group proposal of \$45,000 per employee on the rosters.

8. P&LE and the unions agreed that the September 25, 1987 talks were to be recessed until 6:00 P.M. that day, in anticipation of action by the Interstate Commerce Commission ("ICC") on RLEA's request to stay the sale. When no ICC action was forthcoming by that evening, I told Mr. LaRue I did not see any point in reconvening until we knew what action the ICC was going to take on RLEA's petitions. He said "okay".

9. P&LE and the union group next met on October 7, 1987. A true and correct copy of P&LE's telegram of October 5, 1987 arranging that meeting is attached as Exhibit 2. P&LE did not suggest an earlier meeting because the written ICC order had only been issued September 29, 1987, P&LE understood RLEA was meeting with the purchaser on October 2, 1987, and P&LE was still considering how it could improve its last proposal. I did not tell Mr. LaRue that I was uncertain there would be further meetings with P&LE; I told him on October 2, 1987 that P&LE was not prepared to meet at that time. The October 2 telegram referenced by Mr. LaRue (paragraph 9) was not delivered to P&LE's offices until October 3, a Saturday, and I was unaware of it until the following Monday, October 5, 1987.

10. At the October 7, 1987 meeting between P&LE and its unions, P&LE submitted a revised effects proposal. A true and correct copy of this proposal is attached as Exhibit 3. The parties agreed at this meeting to meet again on October 9, 1987.

11. Mr. LaRue's claim of bad faith bargaining by P&LE is unwarranted. P&LE has met and continues to meet with its unions on the effects issue. Both sides have traded proposals and made modifications to them. While Mr. LaRue undoubtedly would like to see P&LE substantially increase its proposal, P&LE's financial position, which RLEA itself concedes is precarious, does not permit this.

/s/ J. D. Peters  
J. D. Peters

Sworn to and subscribed before me, a Notary Public in and for the County of Allegheny, PA, this 8th day of October, 1987.

/s/ John D. Hartman

RLEA Headquarters  
 342 Olivia Street  
 Second Floor  
 McKeesrock, Pennsylvania  
 15136  
 September 24, 1987  
 Phone 331-1165

J. D. Peters  
 Director Labor Relations  
 P&LE Railroad

G. E. Neuenschwander  
 President  
 P&LE Railroad

Dear Sirs:

Attached is our proposal as discussed at our meeting of September 23, 1987.

Please also be advised that our offer for an employee buyout of the P&LE and the Y&S is still open for discussion at tomorrow mornings meeting.

Sincerely,

/s/ William E. LaRue  
 William E. LaRue  
 Spokesman for the  
 RLEA Coordinating Committee

**MEMORANDUM OF AGREEMENT BETWEEN THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY AND THE EMPLOYEES REPRESENTED BY THE:**

International Association of Machinists & Aerospace Workers

Brotherhood of Locomotive Engineers

American Railway & Airway Supervisors Association

Brotherhood of Railroad Signalmen

International Brotherhood of Boilermakers & Blacksmiths

International Brotherhood of Firemen & Oilers

American Train Dispatchers Association

Sheet Metal Workers' International Association

International Brotherhood of Electrical Workers

Brotherhood of Maintenance of Way Employees

Transport Workers Union of America

Transportation Communication International Union

United Transportation Union

United Transportation Union - Yardmasters Department

**IT IS AGREED:**

*Article I* - Effective with the date of September 25, 87 an initial offer of \$45,000 lump sum separation allowance will be made to all employees on a Roster represented by the above listed unions. Subject to normal deductions plus 17 months union dues.

*Article II* - All employees will have their choice to either take the lump sum or take a monthly allowance of \$1400 per month and travelers GA-23000 coverage. Allowance to be paid on a daily rate of \$64.62 to apply to the first 15 days of each month, for 5 years, subject to normal deductions plus union dues. Monthly allowance will be transferred to family or estate, (whatever is applicable) in the event of employees death during 5 year period. Monies for the 5 year period furlough allowance will be placed in a guarantee account.

*Article III* - All employees previously covered by GA 46000 will continue to have coverage continued in full force and effect.

Signed this 25th date of September 1987.

**AFFADAVIT OF R. E. SMITH**

State of New Mexico

County of Bernalillo

The undersigned, being dully sworn according to law, affirms the following facts to the best of his knowledge, information, or belief:

1. I am President of Chicago West Pullman Transportation Corporation ("CWPT").
2. CWPT representatives have met at least four times and have had numerous telephone calls with representatives of the United Transportation Union to negotiate a collective bargaining agreement to be effective the first day CWPT assumes operation of the Pittsburgh & Lake Erie Railroad ("PLE"). An additional meeting is scheduled for October 9, 1987.
3. CWPT representatives have met once and have had several telephone calls with representatives of the Railway Labor Executives Association to negotiate a collective bargaining agreement for non-operating employees to be effective the first day CWPT assumes operation of the PLE. An additional meeting is scheduled for October 8, 1987.

/s/ R. E. Smith

R. E. Smith

Subscribed and sworn before me this 6th day of October, 1987.

/s/ Valerie Davenport

Notary Public

My commission expires March 6, 1989.

**EXCERPTS FROM TRANSCRIPT OF HEARING ON  
TEMPORARY RESTRAINING ORDER**

[3] (Whereupon, the following proceedings were held on October 8, 1987, beginning at 10:00 a.m., United States District Court, Pittsburgh, Pennsylvania, before the Honorable Alan Bloch.)

THE COURT: This is the time we have set for a hearing on the renewed motion for a temporary restraining order filed by the defendant, Pittsburgh & Lake Erie Railroad, in the matter filed at Civil No. 87-1745.

The circumstances concerning this dispute have changed significantly since the court denied P&LE's request for a TRO on September 21. There is now an exemption from the requirements of the Interstate Commerce Act in effect pursuant to 49 U.S.C., 10505, 49 C.F.R., 1150.31 and the Interstate Commerce Commission's decision in ex parte 392.

That exemption relieves P&LE of the obligation to provide labor protective conditions in connection with the sale of its assets to P&LE Railco, at least until such time as the ICC grants a petition to revoke the exemption.

P&LE, of course, has the burden in this proceeding of demonstrating a likelihood of success on the merits and irreparable harm. It appears to the court that the issue of success on the merits in this case is purely a matter of law. P&LE's counterclaim asserts that the strike by RLEA is illegal because it is in violation of the Interstate Commerce [4] Act.

At the time of the earlier hearing in this matter, the ICC exemption had not yet become effective and, therefore, there was no conflict with ICC authority by the strike. Now, however, there is a conflict. The grant of the ex parte 392 exemption relieves P&LE of the obligation to negotiate with the union concerning the effect of the sale on the employers.

Therefore, the court is holding as a matter of law that the strike is illegal because it tends to negate the ICC's determination that labor protective provisions are not appropriate in transactions such as the sale at issue here. And, since the ICC exemption has relieved P&LE of the duty to negotiate concerning the effects of its sale, P&LE is not in violation of Section 8 of the Norris-LaGuardia Act.

The court is persuaded by the reasoning of the Eighth Circuit in *Missouri Pacific Railroad Company versus United Transportation Union*, 782 F. 2D 107, an Eighth Circuit decision in 1986 on which certificate was denied. There, as in this case, the ICC had determined that labor protective provisions would not be imposed as a condition of the transaction at issue. Under such circumstances, allowing a strike to continue would be equivalent to granting the union free rein to take actions for the purpose and with the effect of frustrating the ICC's ruling.

As the parties have pointed out, transactions such [5] as the consolidation proceeding at issue in the *Missouri Pacific* case are governed by another portion of the ICC Act than that which applies to this case. Consolidation transactions are exempted from the application of all other laws, including the Railway Labor Act's labor protective provisions, pursuant to Section 11341 of the Act.

The Eighth Circuit did not rely upon Section 11341 in reaching its decision, however. Its decision was based on the conclusion that allowing a strike over the issue of labor protective provisions to continue where the ICC has determined none are required would directly undermine the ICC's authority, as well as policies contained in the Interstate Commerce Act concerning exemption of transactions from such requirements.

In addition, it is unclear whether P&LE has the power to provide the type of labor protective conditions which RLEA is demanding. The court is not aware of any legal

authority which would support the union's demand that it be given what appears to be, in effect, a right of first refusal concerning the sale of P&LE's assets, particularly where, as here, P&LE already has entered into an agreement to sell those assets to another buyer.

With respect to the other types of labor protection which RLEA is seeking, it is not clear to the court whether it would be P&LE or the buyer which ordinarily would [6] be required to make the concessions the union is seeking. It would appear that if P&LE is simply unable to provide the concessions, this fact would provide an additional basis for enjoining the strike.

If, therefore, there is irreparable harm caused by this strike, the court will enjoin it because it is contrary to the Interstate Commerce Act. I will not give P&LE the opportunity to present evidence on the issue of irreparable harm and on the issue of their ability to provide the protections being sought by the plaintiffs. And, for that purpose, we recognize you, Mr. Wyatt, to produce that evidence.

MR.. WYATT: Your Honor, on the issue of irreparable harm, the P&LE would like to call Mr. Jay Simmons of Polysar Corporation, one of P&LE's shippers, and Mr. Johnson would conduct the examination.

THE COURT: Fine.

MR. CLARKE: RLEA would object to any evidence by shippers as to irreparable harm. That goes to the public interest and not the irreparable harm of the P&LE. The P&LE is the one seeking the relief, not the government. Therefore, it is the P&LE harm that is at issue.

THE COURT: I think such matters as the loss of income to the railroad, as well as what the strike is causing in terms of preventing the railroad from fulfilling its duties [7] of supplying transportation to shippers, is relevant to

the question of whether there is irreparable harm, and we will hear from this witness.

You may come forward.

MR. CLARKE: If I may, for the record, we would say—we would stipulate to the effect that the strike has stopped the P&LE service of various customers along the line. And that is action—

THE COURT: Will you stipulate that has caused irreparable harm?

MR. CLARKE: Not irreparable harm to the P&LE. The only reason we are not stipulating there is irreparable harm to the P&LE is because of the existence of what we believe is a service interruption policy, which provides all of the lost revenues back to the P&LE.

We do stipulate—

THE COURT: Well, that certainly is evidence you can bring out, as contrary to any evidence that they present about damage to the railroad. But I think the court must be aware of the extent that the strike causes harm to the shippers, and we cannot just accept your stipulation that there is some interference with the shippers along the line.

We must know the extent of that interference in order to be able to judge what kind of harm is being done.

\* \* \* \*

[46] DONALD VOGEL, called as a witness on behalf of the Plaintiff, having been duly sworn, testified as follows:

MR. CLARKE: May I proceed, Your Honor?

THE COURT: Yes.

#### DIRECT EXAMINATION

BY MR. CLARKE:

Q. Would you please state your name, sir, and your middle initial, and spell your last name for the court reporter?

A. My name is Donald Vogel, Donald K. Vogel. V-O-G-E-L.

\* \* \* \*

[47] A. Yes, I am president of Local 1427 of the Transport Workers Union.

Q. Is that the TWU?

A. Yes, sir.

Q. Mr. Vogel, how long have you been employed by the Pittsburgh & Lake Erie?

A. About 17 and a half years.

Q. In what capacity? What do you do for the P&LE?

A. I am a freight car repair man.

Q. Where do you work?

A. In McKees Rocks.

Q. Now, how long have you been doing that?

A. The 17-year period I have been with the railroad, I have been at McKees Rocks.

Q. Mr. Vogel, can you tell us whether or not the TWU repairs cars that are owned by the P&LE?

A. Yes, they do.

Q. Do they repair cars that are owned by the P&LE that might be found in a bad condition on another line?

A. Yes. Generally these cars are brought back as a bad order car, home shop, and they are sent back to the P&LE at some point in time and repaired in our shop or other shops.

[48] Q. Mr. Vogel, can you tell us, sir, whether or not in the past several days you have had any discussions with the P&LE about who will do the repair work on the 6,000 cars the P&LE will keep once this sale occurs?

A. Yes. Yesterday we had a meeting with Mr. James D. Peters, Mr. Ed Yurcon and Mr. Bob Powell in an attempt—

Q. Spell the last name.

A. Powell, P-O-W-E-L-L. And we did discuss generally what is going to happen to the cars left over as a result of the sale of the P&LE and who was going to repair those cars.

\* \* \* \*

[49] Q. Did they tell you anything about whether the car repair facility will be kept by the P&LE and not transferred to P&LE Railco?

\* \* \* \*

[50] A. I asked them directly, was there a possibility that since Chicago West Pullman was in fact taking over the car shop, was there a possibility that the Pittsburgh & Lake Erie Railroad would then lease back that car shop and very possibly sublease it to someone like Homer Jones and U. S. Steel Rail Car or U. S. Rail Car?

Would, in fact, the P&LE continue to repair cars in that facility and certain of their cars? And they respond I am trying to be quite honest there. I believe that they responded that there was no direct opinion on that at the present time.

Q. Did they tell you whether or not the car repair facility that you have worked at for 17 years is or is not being transferred to the Chicago West Pullman group?

A. They did definitely say that shop was going to Chicago West Pullman.

Q. They did or did not?

A. They did.

Q. So the shop is going over?

A. Yes.

Q. Is there any other car facility where you and your fellow employees work at where you can repair the 6,000 cars that are left?

[51] A. Not a major heavy car repair facility; no. There are spot repair facilities, but certainly nothing with the facilities and capabilities of the K. S. Steel Car Shop.

Q. You have agreements with the P&LE, do you not, dealing with continued employment?

A. That is correct.

Q. Are those agreements—how would you describe that agreement? What does it provide for?

A. Well, we have a grave concern for the loss of—

THE COURT: That is not the question you were asked.

THE WITNESS: Could you give me the question again?

BY MR. CLARKE:

Q. Describe the agreements you have for job stabilization and job security?

A. The job protective agreement we have is generally a blanket agreement for guaranteed work force. It has a moratory clause in it that the P&LE can reopen in, I believe it is 1989, based on car loadings. If the car loadings would happen to fall below a certain level, then they would have again the right to come in and attempt to renegotiate that agreement.

Q. In the meantime until they have the right to renegotiate in 1989, what are they required to do?

A. They are required to maintain an employment—everybody [52] covered by that protective agreement.

Q. Have you asked them about whether or not they will live up to that agreement if the sale occurs?

A. Yes, they have been asked directly several times, and they have answered that they do not necessarily believe that they are going to have to honor all agreements.

Q. What about that agreement?

A. Again, they said that possibly would be a legal issue, and their position was they are not required to honor any agreements.

MR. CLARKE: No further questions.

THE COURT: Cross-examine.

#### CROSS-EXAMINATION

BY MR. WYATT:

Q. Mr. Vogel, you indicated that, under the agreement you testified about, that if the car loadings fell below a certain level, the Pittsburgh & Lake Erie Railroad had a right to reopen and renegotiate the agreement; isn't that your testimony?

MR. CLARKE: There was also a time period of 1989 involved here.

THE COURT: I heard his testimony. He said some time in 1989, I believe.

THE WITNESS: This is correct.

[53] BY MR. WYATT:

Q. Do you have a copy of that agreement in the courtroom with you?

A. I may have a copy of an agreement with some inking on it, but it is probably still legible; yes.

Q. You also testified about remarks made by the Pittsburgh & Lake Erie Railroad personnel to you about their

obligations to honor the agreement. In fact, what they said was that they disputed your interpretation of the agreement as requiring lifetime employment in this circumstance; didn't they?

A. No. In fact, what they said—they were totally hanging their hat on what was coming down from the ICC, that they would be exempt from operations, and it would be up to us to further adjudicate that issue.

MR. WYATT: If I could have a moment here, Your Honor.

BY MR. WYATT:

Q. Mr. Vogel, when were those remarks made to you and by whom?

A. These remarks were made on several occasions. We have had meetings from time to time sporadically at best over the month of September and up to and including yesterday.

Q. The question was what date and by whom?

A. Okay. You are making that very difficult for me to [54] really define exactly what date. I know yesterday the subject did come up about generally were they going to honor all agreements, and would there be any agreements left in place.

And they again said certain agreements—and this is by Mr. Jim Peters. They said certain agreements would possibly have to be left in place. But they did not specify what those agreements would be or which workers were going to be involved.

Q. Your testimony now is that Mr. Peters testified certain agreements would be honored by the P&LE Railroad, isn't that what I understand your testimony to be?

A. Well, he says—yes.

Q. That is your testimony. And he did not specify which agreements those were, did he?

A. No, he did not. He did say there apparently would be some work left for the Pittsburgh & Lake Erie Railroad and that some later time it would have to be determined who would work and would that work be a matter of contractual arrangements.

Q. So Mr. Peters said the question of what contractual arrangements would be honored and with whom would be decided by the Pittsburgh & Lake Erie, but he did not say he would not honor your contract, did he?

A. Not directly; no. He did say that certain of those things would be a matter of a form of arbitration . . .

\* \* \* \*

[55] Q. He did suggest to you it might very well have to be arbitrated as to whether or not the permanent employment guarantees applied in this situation, didn't he?

A. He did not allude to that type of situation.

Q. I think your earlier testimony was that he specifically mentioned it might have to be arbitrated; am I correct?

A. He may not have used the words directly arbitrated, but I am certain that is what was meant, what was implied.

Q. You are certain of that because there is a disputed interpretation of the agreement between you and Mr. Peters as to whether or not it gives you lifetime employment in these circumstances, and a disputed interpretation would have to be arbitrated, wouldn't it?

MR. CLARKE: We have two questions in here. I ask it be broken up.

THE COURT: Do you understand the question?

THE WITNESS: Could you give it to me one at a time?

THE COURT: Read back the question.

(Whereupon, the last question was read back by the court reporter.)

THE COURT: Go ahead and answer.

THE WITNESS: Okay. I would have to take some exception to the way that question was directed to me. I feel we never had the opportunity. I had on several occasions written letters to Mr. Peters asking to have some discussion [56] over the job security issue, and he said he did not feel there was any need to have discussion on certain—on the letters that I issued to him. \* \* \* \*

WILLIAM LARUE, called as a witness on behalf of the Plaintiff, having been duly sworn, testified as follows:

MR. CLARK: May I proceed?

THE COURT: Yes, you may.

#### DIRECT EXAMINATION

BY MR. CLARKE:

Q. Would you please state your name?

[57] A. My name is William LaRue, L-A-R-U-E.

Q. Mr. LaRue, what is your occupation at the present time?

A. I am a vice president of the Brotherhood of Maintenance-of-Way employees.

\* \* \* \*

Q. Now, let me ask you this. On the 7th of October, did you have a meeting with the P&LE?

A. We did.

Q. Now, when you appeared at that meeting with the P&LE, who did you appear on behalf of?

A. I appeared in two capacities.

Q. Tell us what those capacities were.

A. Vice present of the Brotherhood of Maintenance-of-Way with duties in the northeast region of the United States, and [58] spokesman for the 14 rail unions of the RLEA coordinating committee.

Q. What was your purpose in meeting with the P&LE on the 7th, the October 7 meeting?

A. Would you clarify that?

Q. What were you attempting to do at that meeting?

A. At that meeting we were making efforts to resolve our differences as to the effects of the P&LE employees as a result of the sale to the Chicago West Pullman and the loss of jobs.

Q. Were there any questions raised at that meeting to—addressed to P&LE about what employees would remain after the sale occurred?

A. That question came as a result of trying to determine whether the P&LE would apply the current agreements in effect, of all the unions presently on their property. And, yes, there was some additional conversation on exactly what you just asked.

Q. And what crafts were involved in those questions?

A. I specifically asked questions on the TCU or the formerly BRAC.

Q. B-R-A-C?

A. Yes.

Q. Brotherhood of Railway and Airline Clerks?

A. Yes.

[59] Q. What does TCU mean?

A. Transportation Communication Unit.

Q. What did you specifically ask about that union?

A. As a result of their unrealistic answers—

THE COURT: Just answer what you asked about it.

THE WITNESS: Yes, Your Honor. I had asked, since the Interstate Commerce Commission left the shell of a company, following the sale of the assets, and certain of that work had been performed by the BRAC—

BY MR. CLARKE:

Q. Such as what?

A. Such as leasing contracts, and certain other of the clerical work which will continue on with the Pittsburgh & Lake Erie Railroad Company, would they apply the agreement?

Q. Who did you direct that question to?

A. I directed that question to Mr. Jim Peters, and I believe also Mr. Yurcon.

Q. And Mr. Jim Peters, what is his position with the railroad?

A. Mr. Peters is the director of labor relations for the Pittsburgh & Lake Erie Railroad Company.

Q. What was the response? Who made the response, and what he say?

A. Mr. Peters responded that they did not know if there would be any employees, and if the agreement would apply.

# PITTSBURGH & LAKE ERIE RR

OCTOBER 27, 1987

## LABOR GROUP TO SAVE P&LE JOBS

INTERNATIONAL ASSOCIATION OF MACHINISTS &  
AEROSPACE WORKERS  
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS &  
BLACKSMITHS  
AMERICAN RAILWAY & AIRWAY SUPERVISORS ASSOCIATION  
TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION  
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS  
SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION  
INTERNATIONAL BROTHERHOOD OF FIREMAN & OILERS—  
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES  
AMERICAN TRAIN DISPATCHERS ASSOCIATION  
BROTHERHOOD OF LOCOMOTIVE ENGINEERS  
TRANSPORT WORKERS UNION OF AMERICA  
BROTHERHOOD OF RAILROAD SIGNALMEN

## OFFICIAL PRESS RELEASE re: P&LE RR

PRIOR TO THE RESUMPTION OF STRIKE ACTIVITY ON THE P&LE RR A FULL BRIEFING AND DISCUSSION WILL BE HELD THE EVENING THURSDAY OCT. 29, 1987 FOR ALL LOCAL CHAIRMEN.

Also to be discussed:

Details of proposal for ESOP (employee ownership plan) Now that General Electric Credit Corp. is pulling out of CWPT plan it is felt that P&LE RR might finally be willing to allow workers a chance at a partnership in a plan to save the P&LE. We are serious on this plan, we have the financial backing, the P&LE has only to come off of its high horse and talk *SERIOUSLY*.

Also, information has it that some rolling stock is about to formally change hands to the CWPT even before the sale is complete.

Reaffirmation that all locals are resolute in their full support of the strike action as determined at a *local level*.

The call is out for a major demonstration in Washington D.C. by all rail labor. The P&LE RR shall not be remembered as "having gone down fighting" but rather as the first success in stopping the RAPE of railroad employees. We are *determined*, our leaders shall again be so informed.

AN OPEN STATEMENT TO THE P&LE RR / PLE RAILCO INC.-COME TO THE TABLE. ---- CHICAGO OUT---- EMPLOYEES IN. ---- BUT IF IT'S A FIGHT YOU WANT, A FIGHT YOU WILL GET.

RESPECTFULLY SUBMITTED,  
LABOR GROUP TO SAVE P&LE JOBS

# WESTERN UNION MAILGRAM

DONALD VOGEL  
851 COTTONWOOD DR  
MONROEVILLE PA 15146

JAMES D PETERS DIRECTOR OF LABOR  
RELATIONS PITTSBURGH AND LAKE ERIE RAILROAD  
4 STATION SQUARE - COMMERCE COURT  
PITTSBURGH PA 15219

DEAR SIR,

THIS LETTER COMES IN THE FORM OF AN INQUIRY AS TO WHETHER YOU INTEND TO NOW COMPLY WITH THE RAILWAY LABOR ACT AND ENTER INTO MEANINGFUL NEGOTIATIONS REGARDING THE SALE OF THE P&LE RAILROAD TO THE C.W.P.T.? EMPHASIS ON THE USE OF THE WORD NEGOTIATIONS.

SINCE YOU HAVE SOME DIFFICULTY WITH THE FINANCIAL ARRANGEMENTS IN THE SALE WOULD THE P&LE NOW BE WILLING TO GIVE SERIOUS CONSIDERATION TO AN ESOP OR PARTNERSHIP PROGRAM? THIS AS OPPOSED TO THE SALE TO C.W.P.T.

RETENTION OF THE STATUS QUO AS PROVIDED UNDER THE RAILWAY LABOR ACT REMAINS A MUST IF ANY OF THE ABOVE MENTIONED ITEMS ARE TO BE NEGOTIATED. PLEASE RESPOND SOONEST.

SINCERELY,

DONALD K VOGEL PRESIDENT LOCAL 1427  
TRANSPORT WORKERS UNION OF AMERICA AND IN  
BEHALF OF LABOR GROUP TO SAVE P&LE JOBS

10:37 EST

MGMCOMP

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 87-1745

RAILWAY LABOR EXECUTIVES' ASSOCIATION  
*Plaintiff,*  
v.

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Defendant.*

THIRD SUPPLEMENTAL AFFIDAVIT  
OF GORDON E. NEUENSCHWANDER

COMES NOW GORDON E. NEUENSCHWANDER,  
who having been duly sworn on oath, deposes and says:

1. This supplements my previous Affidavit submitted in  
Civil Action No. 87-1745.

2. The sales transaction between Railco and Pittsburgh  
& Lake Erie Railroad Company has as of this date not  
closed. We do not anticipate closure prior to Thanksgiving.  
The delay in closure has been a direct result of the un-  
willingness of parties which were to provide the financial  
backing to Railco to proceed in the weeks following the  
strike. Since these parties have withdrawn from the trans-  
action, Railco has attempted to develop alternate sources  
of financing.

3. In part, the illegal work stoppage and the threat of  
a future illegal work stoppage following the reversal of  
this Court's conclusion that the Interstate Commerce Act  
can be accommodated to the Norris-LaGuardia Act by the  
Third Circuit Court of Appeals had brought about a with-  
drawal of financial support from this transaction.

4. It will be extremely difficult for Railco to obtain fi-  
nancing to complete the transaction as long as there exists  
the threat that rail labor may call a local strike or regional  
strike if the transaction appears likely to take place. Their  
press release following the Third Circuit's ruling indicates  
they intend to strike before any transaction takes place.  
A copy is attached.

5. At this point, P&LE exists on a week-by-week basis  
at the discretion of its 22 principal creditors. They have  
indicated to me as President of the Pittsburgh & Lake  
Erie, that should the transaction with Railco fail to take  
place, further drastic measures would have to be imme-  
diately considered including abandonment or bankruptcy.

6. In my judgment, the sale to Railco is the only viable  
course of action for the Pittsburgh & Lake Erie Railroad  
Company. I have spent countless hours over the last sev-  
eral years trying to convince other major railroads that  
they should consider Pittsburgh & Lake Erie Railroad  
Company as an acquisition candidate. All of them have  
declined to do so.

7. The only purchaser that has expressed a willingness  
to acquire the Pittsburgh & Lake Erie and indeed the only  
purchaser to actually submit a purchase proposal was  
Railco. At this point, Railco is the only serious prospective  
purchaser of the railroad and failure to consummate this  
transaction will result in dire consequences for all con-  
cerned parties.

8. I have read the foregoing Supplemental Affidavit con-  
sisting of three pages and swear it is true and correct to  
the best of my knowledge and belief.

/s/ Gordon E. Neuenschwander  
Gordon E. Neuenschwander

Sworn and subscribed before me,  
a Notary Public in and for the  
County of Allegheny, PA, this

13th day of November, 1987.

/s/ Donna L. Woshner  
Notary Public

DONNA L. WOSHNER, NOTARY PUBLIC  
PITTSBURGH, ALLEGHENY COUNTY  
MY COMMISSION EXPIRES OCT. 26, 1991  
Member, Pennsylvania Association of Notaries

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

\_\_\_\_\_  
Civil Action No. 87-1745  
\_\_\_\_\_

RAILWAY LABOR EXECUTIVES' ASSOCIATION  
*Plaintiff,*

v.

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Defendant.*

FOURTH SUPPLEMENTAL AFFIDAVIT  
OF JAMES D. PETERS

I, JAMES D. PETERS, being duly sworn on oath, depose and state as follows:

1. I am Director, Labor Relations, for The Pittsburgh and Lake Erie Railroad Company ("P&LE"). In this position, I have participated in meetings with P&LE's unions concerning the effects of the sale of P&LE's rail assets.

2. The purpose of this supplemental affidavit is to supplement the information provided in my prior four affidavits filed in this action.

3. After this Court ruled on October 8, 1987 that P&LE is relieved of its duty to negotiate with its unions concerning the effect of its sale on P&LE employees, P&LE met with representatives of all of its unions on October 9, 1987 to attempt to reach an agreement on the effects of the sale. P&LE's agreement to meet on the subject was without waiver or prejudice to its position that it does not have a duty to bargain over the effects of the sale.

4. At the October 9, 1987 meeting between P&LE and its unions, P&LE informed the unions that its last effects

offer remained open. A copy of that offer is attached as Exhibit 3 to my Third Supplemental Affidavit of October 8, 1987 which was submitted to this Court by letter dated October 8, 1987 from G. Edward Yurcon, Vice President-Law, P&LE. No agreement was reached at the October 9, 1987 meeting and, by mutual agreement, the meetings have been recessed until the parties agree to reconvene.

5. P&LE stands ready to meet with its unions to attempt to reach an agreement on the effects of the sale and will remain willing to do so after P&LE has completed the sale of its rail assets.

/s/ James D. Peters  
James D. Peters

Sworn to and subscribed before me, a Notary Public in and for the County of Allegheny, PA, this 13th day of November, 1987.

/s/ Donna L. Woshner

My Commission Expires: —

DONNA L. WOSHNER, NOTARY PUBLIC  
PITTSBURGH, ALLEGHENY COUNTY  
MY COMMISSION EXPIRES OCT. 26, 1991  
Member, Pennsylvania Association of Notaries

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT  
OF PENNSYLVANIA

— —  
Civil Action  
No. 87-1745  
— —

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Plaintiff,*  
v.

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Defendant.*

MOTION OF PLAINTIFF RAILWAY LABOR  
EXECUTIVES' ASSOCIATION FOR SUMMARY  
JUDGMENT

Pursuant to Fed. R. Civ. P. 56, plaintiff, Railway Labor Executives' Association ("RLEA") moves for summary judgment declaring that defendant Pittsburgh & Lake Erie Railroad Co. ("P&LE") is required by the Railway Labor Act ("RLA"), 45 U.S.C. §151, *et seq.*, to give notice under Section 6 of the Act, 45 U.S.C. §156, and to bargain with the unions which represent its employees regarding the impact of the sale of virtually all of its rail properties on those employees, in accordance with the negotiation and dispute resolution processes of the RLA, before such sale is consummated. RLEA also requests that the Court enter a permanent injunction requiring defendant P&LE, its directors and officers to give the requisite notices under Section 6 of the Railway Labor Act, to bargain with rail labor over the impact of the sale on its employees and their existing contractual rights, and to maintain the status

quo which currently exists until it has complied fully with its notice and bargaining obligations.

RLEA submits that there are no material facts in dispute in this matter and that for the reasons set forth in the memorandum accompanying this motion, RLEA is entitled to judgment as a matter of law.

Respectfully submitted,

/s/ John O'B. Clarke, Jr.

John O'B. Clarke, Jr.

HIGSAW & MAHONEY,  
P.C.

Suite 210  
1050 17th Street, N.W.  
Washington, D.C. 20036  
(202) 296-8500

Graydon R. Brewer

GREENFIELD & MURTAGH  
728 Fifth Avenue  
Pittsburgh, Pennsylvania 15219  
(412) 261-4466

Attorneys for Plaintiff Railway  
Labor Executives' Association

Date: November 13, 1987

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 87-1745  
Judge Bloch

RAILWAY LABOR EXECUTIVES' ASSOCIATION

*Plaintiff,*

v.

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,

*Defendant.*

FIFTH SUPPLEMENTAL AFFIDAVIT  
OF JAMES D. PETERS

COMES NOW, JAMES D. PETERS, who having been duly sworn on oath, deposes and says:

1. This Affidavit supplements my previous Affidavits given in connection with case number 87-1745.

2. I have never told any member of RLEA, or any Pittsburgh & Lake Erie Railroad Company employee, that P&LE intended to terminate its collective bargaining agreements after the sale of its railroad assets to Railco, Inc. Rather, it has always been our position that P&LE would continue to honor its agreements. I have, as Mr. Vogel testified in Judge Bloch's Court on October 8, 1987, told RLEA representatives that P&LE did not believe the sale of its rail assets triggered the labor protections contained in certain agreements. I also told Mr. Vogel and others that P&LE did not believe the so-called job guarantees for TWU employees were binding on the company if its assets were sold. I also made it clear that we would arbitrate these disputes if need be since P&LE considers itself to be bound by the arbitration clauses in the contracts.

I have read the foregoing consisting of two pages and swear that it is true and correct to the best of my knowledge and belief.

---

James D. Peters

Subscribed and sworn to  
before me this \_\_\_\_ day  
of November, 1987.

---

Notary Public

Mediation Agreement  
Case No. A-11616

**MEMORANDUM OF AGREEMENT BETWEEN THE  
PITTSBURGH & LAKE ERIE RAILROAD COMPANY  
AND THE EMPLOYEES THEREON REPRESENTED BY  
THE BROTHERHOOD OF RAILWAY, AIRLINE AND  
STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS  
AND STATION EMPLOYEES**

**IT IS HEREBY AGREED:**

**ARTICLE I - WAGES**

- A. Effective on January 15, 1986, the prevailing paid rates of pay (including cost-of-living allowances) of all employees covered by this Agreement shall be reduced by twelve (12%) percent.
- B. This wage reduction shall be applied in the same manner as general wage increases have been applied in the past so as to give effect to this reduction in pay irrespective of the method of payment.
- C. This wage reduction will become effective on January 15, 1986, and will remain in effect for 24 months thereafter, following which the wage rates will revert to those in effect prior to the twelve (12%) percent reduction being applied.
- D. During the 24-month period in which the wage reduction provided for in this Article I is in effect, the 12% wage reduction will be subject to adjustment on the following basis:
  - (1) In any quarter following a quarter in which the average monthly revenue carloads exceed 10,000 but are less than 11,000, the wage reduction will be adjusted to 11%.

- (2) In any quarter following a quarter in which the average monthly revenue carloads exceed 11,000, the wage reduction will be adjusted to 10%.
- (3) The wage reduction will revert to 12% in the quarter following the adjustment period unless the average monthly revenue carloads in the adjustment period justify an adjustment as provided for in subparagraphs 1 and 2 above.

## ARTICLE II - OPERATION OF COMPUTER CENTER

- A. Notwithstanding any existing rule, agreement or practice to the contrary, effective on the date of this Agreement, Carrier shall have the right to operate the Computer Center on a three-trick basis to meet operating requirements which it is understood can be on a 5, 6 or 7-day basis.

## ARTICLE IX - SALE

- A. If, while Article I of this Agreement is in effect, The Pittsburgh & Lake Erie Railroad Company is sold to and merged with another Carrier, with I.C.C. approval, employees covered by this Agreement will have their wage rates restored to the rates that were in effect prior to the wage reduction provided for in Article I of this Agreement being applied.

## ARTICLE X - FREEZE OF MANAGEMENT WAGES

- A. While a wage reduction as provided for in Article I of this Agreement is in effect, the total wage compensation of the 33 top management personnel will not be increased.

## ARTICLE XI - EFFECT OF THIS AGREEMENT

- A. This Agreement is in settlement of the dispute growing out of Attachment A of the Notice served on the Carrier by the Organization signatory hereto dated March

- 29, 1984 and the Supplemental Notice dated July 26, 1985 and the attachment thereto relating to wages and rules changes and the Notice served by the Carrier on August 29, 1984 for concurrent handling therewith.
- B. This Agreement will become effective on January 15, 1986 and, except as provided for in Articles I, VII and X hereof, shall remain in effect thereafter until changed or modified in accordance with the provisions of the Railway Labor Act, as amended.
- C. Except as otherwise agreed to, neither party to this Agreement shall serve any notice or proposal to change any matter contained in this Agreement or in the proposals identified in Section A hereof, prior to October 15, 1987 (not to become effective prior to January 15, 1988), and any pending notices which propose such matters are hereby withdrawn.
- D. This Article will not bar the Carrier and the Organization from agreeing on any subject matter of mutual interest.

Signed at Pittsburgh, PA this 14th day of January, 1986.

FOR THE BROTHERHOOD OFFER THE PITTSBURGH & LAKE  
RAILWAY, AIRLINE ANDERIE RAILROAD COMPANY:  
STEAMSHIP CLERKS, FREIGHT  
HANDLERS, EXPRESS AND  
STATION EMPLOYEES. /s/ James D. Peters  
Director-Labor Relations

/s/ Robert A. Scardelletti  
General Chairman

APPROVED:

/s/ R.J. Kilroy  
President

Mediation Agreement  
Case No. A-11615

**MEMORANDUM OF AGREEMENT BETWEEN THE  
PITTSBURGH & LAKE ERIE RAILROAD COMPANY  
AND THE EMPLOYEES THEREON REPRESENTED BY  
LODGE NO. 5061, AMERICAN RAILWAY & AIRWAY  
SUPERVISORS ASSOCIATION**

**IT IS HEREBY AGREED:**

**ARTICLE I - WAGES**

- A. Effective on October 1, 1986, the prevailing paid rates of pay (including cost-of-living allowances) of all employees covered by this Agreement shall be reduced by twelve (12%) percent.
- B. This wage reduction shall be applied in the same manner as general wage increases have been applied in the past so as to give effect to this reduction in pay irrespective of the method of payment.
- C. This wage reduction will become effective on October 1, 1986, and will remain in effect for 24 months thereafter, following which the wage rates will revert to those in effect prior to the twelve (12%) percent reduction being applied.
- D. During the 24-month period in which the wage reduction provided for in this Article I is in effect, the 12% wage reduction will be subject to adjustment on the following basis:
  - (1) In any quarter following a quarter in which the average monthly revenue carloads exceed 10,000 but are less than 11,000, the wage reduction will be adjusted to 11%.
  - (2) In any quarter following a quarter in which the average monthly revenue carloads exceed 11,000, the wage reduction will be adjusted to 10%.

- (3) The wage reduction will revert to 12% in the quarter following the adjustment period unless the average monthly revenue carloads in the adjustment period justify an adjustment as provided for in subparagraphs 1 and 2 above.

**ARTICLE II - TERMINATION OF SENIORITY**

- A. The seniority of any employee who establishes seniority in a craft represented by the Organization signatory hereto, after the effective date of this Agreement and who does not perform any active service with the Carrier for 24 consecutive months shall be terminated.

or strike provided that such conditions result in suspension of the Carrier's operations in whole or in part. It is understood and agreed that such temporary force reductions will be confined solely to those work locations directly affected by any suspension of operations. No advance notice of force reduction to employees is required under the foregoing conditions.

- (1) When forces have been so reduced and thereafter operations are restored, such employees must be recalled upon the termination of the emergency.
- (2) It is understood that the term "strike" as used in this subsection is not confined to a strike by any of Carrier's employees, but can be a strike in another business or industry, wherein Carrier's operations are affected in whole or in part.

**ARTICLE IV - ACQUISITION**

- A. If, while Article I of this Agreement is in effect, this Carrier acquires employees of the Norfolk Southern in connection with acquisition of Norfolk Southern rail lines, as a result of the sale of Conrail to the Norfolk Southern, employees covered by this Agreement will have their wage rates adjusted to equal the rates paid

to such acquired employees six (6) months after the date such employees are acquired.

#### ARTICLE V - SALE

- A. If, while Article I of this Agreement is in effect, The Pittsburgh & Lake Erie Railroad Company is sold to and merged with another Carrier, with I.C.C. approval, employees covered by this Agreement will have their wage rates restored to the rates that were in effect prior to the wage reduction provided for in Article I of this Agreement being applied.

#### ARTICLE VI - INSURED BENEFITS

Existing arrangements shall be continued for coverage of Supervisors for insured benefits under policies negotiated nationally by the Carriers' Conference Committee and participating Railroad Labor Organizations, including policy changes as may result from current national negotiations. Subsequent requests for changes in insured benefits shall be governed by the applicable moratorium provisions resulting from current national negotiations.

Mediation Agreement  
Case No. A-11613

#### MEMORANDUM OF AGREEMENT BETWEEN THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY AND THE EMPLOYEES THEREON REPRESENTED BY LODGE NO. 5062, AMERICAN RAILWAY & AIRWAY SUPERVISORS ASSOCIATION

IT IS HEREBY AGREED:

#### ARTICLE I - MONTHLY RATES

Effective October 1, 1986, existing monthly rates of pay shall be reduced by \$115.00 per month. Thereafter, employees represented by the Organization signatory hereto shall be paid at the punitive hourly rate of their position for all time worked in excess of the normal hours exclusive of transfer time, preparatory time and/or end of day time of their assignment, and any existing rules or practices to the contrary are hereby amended to that extent. This Article will become effective on October 1, 1986 and will remain in effect for 24 months thereafter, after which the \$115.00 per month will be restored and the previous overtime provisions will again be effective.

#### ARTICLE II - WAGES

- A. Effective on October 1, 1986, and after the application of Article I of this Agreement, the prevailing paid rates of pay (including cost-of-living allowances) of all employees covered by this Agreement shall be reduced by twelve (12%) percent.
- B. This wage reduction shall be applied in the same manner as general wage increases have been applied in the past so as to give effect to this reduction in pay irrespective of the method of payment.
- C. This wage reduction will become effective on October 1, 1986, and will remain in effect for 24 months there-

after, following which the wage rates will revert to those in effect prior to the twelve (12%) percent reduction being applied.

D. During the 24-month period in which the wage reduction provided for in this Article II is in effect, the 12% wage reduction will be subject to adjustment on the following basis:

- (1) In any quarter following a quarter in which the average monthly revenue carloads exceed 10,000 but are less than 11,000, the wage reduction will be adjusted to 11%.
- (2) In any quarter following a quarter in which the average monthly revenue carloads exceed 11,000, the wage reduction will be adjusted to 10%.
- (3) The wage reduction will revert to 12% in the quarter following the adjustment period unless the average monthly revenue

In case a dispute arises involving an interpretation or application of the award, the Committee, upon request of either party, shall interpret the award in light of the dispute.

- (9) The Committee hereby established shall continue in existence until it has disposed of the issue submitted to it under this Section, after which it will cease to exist, except for interpretation of its award as above provided.
- D. Notwithstanding the provisions of any other subsection of this Article IV, the Carrier shall have the right to furlough its employees under emergency conditions such as flood, snow storm, hurricane, tornado, earthquake, fire or strike provided that such conditions result in suspension of the Carrier's operations in whole or in part. It is understood and agreed that such temporary force reductions will be confined solely to those work

locations directly affected by any suspension of operations. No advance notice of force reduction to employees is required under the foregoing conditions.

- (1) When forces have been so reduced and thereafter operations are restored, such employees must be recalled upon the termination of the emergency.
- (2) It is understood that the term "strike" as used in this subsection is not confined to a strike by any of Carrier's employees, but can be a strike in another business or industry, wherein Carrier's operations are affected in whole or in part.

#### ARTICLE V - ACQUISITION

- A. If, while Article II of this Agreement is in effect, this Carrier acquires employees of the Norfolk Southern in connection with acquisition of Norfolk Southern rail lines, as a result of the sale of Conrail to the Norfolk Southern, employees covered by this Agreement will have their wage rates adjusted to equal the rates paid to such acquired employees six (6) months after the date such employees are acquired.

#### ARTICLE VI - SALE

- A. If, while Article II of this Agreement is in effect, The Pittsburgh & Lake Erie Railroad Company is sold to and merged with another Carrier, with I.C.C. approval, employees covered by this Agreement will have their wage rates restored to the rates that were in effect prior to the wage reduction provided for in Article II of this Agreement being applied.

Mediation Agreement  
Case No. A-11542

MEMORANDUM OF AGREEMENT BETWEEN THE  
PITTSBURGH & LAKE ERIE RAILROAD COMPANY  
AND THE EMPLOYEES THEREON REPRESENTED BY  
THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS

IT IS HEREBY AGREED:

ARTICLE I - WAGES OF LOCOMOTIVE ENGINEERS

- A. Effective on January 29, 1986, all prevailing paid rates of pay (including cost-of-living allowances) of Locomotive Engineers shall be reduced by twelve (12) percent.
- B. This wage reduction shall be applied in the same manner as general wage increases have been applied in the past so as to give effect to this reduction in pay irrespective of the method of payment.
- C. In determining new hourly rates, fractions of a cent will be disposed of by applying the next higher quarter of a cent.
- D. This wage reduction will become effective on January 29, 1986, and will remain in effect for 24 months thereafter, following which the wage rates will revert to those in effect prior to the twelve (12) percent reduction being applied.

ARTICLE II - ARBITRARIES

- A. Effective on January 29, 1986, the arbitrary allowance paid to employees covered by this Agreement for delivering trains to and/or receiving trains from Newell Interchange as provided for in Article 24, as amended, shall be eliminated.
- B. Effective on January 29, 1986, the arbitrary allowances listed below paid to employees covered by this Agree-

ment shall be reduced to the amounts indicated:

1. *Initial Terminal Delay*

Payment for ITD shall be paid in accordance with the existing agreement on a minute basis at 1/10th of the basic daily rate according to the class of engine used.

2. *Final Terminal Delay*

Payment for FTD shall be paid in accordance with the existing agreement except that payment shall be on a minute basis at

- C. Initial Terminal Delay for engine service employees of westbound trains originating at Monessen shall be paid on a minute basis after the lapse of one hour and 30 minutes.

ARTICLE IX - NEW EMPLOYEES

- A. Employees hired after the effective date of this Agreement shall be paid at 75 percent of the applicable rate of pay (including COLA) of the service to which assigned. This rate will increase five (5) percent per year of active service until it is equal to the standard rate.
- B. Existing arbitrary allowances as listed on Attachment "B" hereof, shall not be applicable to employees hired after the effective date of this Agreement.

ARTICLE X - ACQUISITION

- A. If, while Article I of this Agreement is in effect, this Carrier or its holding company acquires employees of the Norfolk Southern in connection with acquisition of Norfolk Southern rail lines, as a result of the sale of Conrail to the Norfolk Southern, employees covered by this Agreement will have their wage rates adjusted to equal the rates paid to such acquired employees six (6) months after the date such employees are acquired.

**ARTICLE XI - SALE**

- A. If, while Article I of this Agreement is in effect, The Pittsburgh & Lake Erie Railroad Company is sold to and merged with another Carrier, with I.C.C. approval, employees covered by this Agreement will have their wage rates restored to the rates that were in effect prior to the wage reduction provided for in Article I of this Agreement being applied.

**ARTICLE XII - EFFECT OF THIS AGREEMENT**

- A. This Agreement is in settlement of the dispute growing out of Attachment "A" of the Notice served on the Carrier by the Organization signatory hereto dated January 30, 1984 and the Notice served by the Carrier on August 29, 1984 for concurrent handling therewith.
- B. This Agreement will become effective on January 29, 1986 and, except as provided for in Article I hereof, shall remain in effect thereafter until changed or modified in accordance with the provisions of the Railway Labor Act, as amended.
- C. Except as otherwise agreed to, neither party to this Agreement shall serve any notice or proposal to change any matter contained in this Agreement or in the proposals identified in Section A hereof, prior to October 29,

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**Civil Action  
Nos. 87-1745  
87-2332**

RAILWAY LABOR EXECUTIVES ASSOCIATION,  
vs.

PITTSBURGH & LAKE ERIE RAILROAD CO.

**PROCEEDINGS**

Transcript of Telephone Conferences held on November 23, 1987, United States District Court, Pittsburgh, Pennsylvania, before the Honorable Alan N. Bloch, D.J.

**APPEARANCES:**

For the P&LE Railroad: Richard Wyatt, Esq.  
Ronald M. Johnson, Esq.  
G. Edward Yurcon, Esq.

For the R L E A: John Clarke, Esq.  
Graydon Brewer, Esq.

Jordan Lilienthal, Reporter  
1029 U. S. Courthouse  
Pittsburgh, Pa 156219  
412-281-8184

Proceedings recorded by mechanical stenography. Transcript produced by notereading.

• • • •

THE COURT: All right. With that in mind, I don't think there is any necessity for having a hearing tomorrow and I am going to make the following ruling: The Court is

ruling that, as a matter of law, the Pittsburgh & Lake Erie Railroad has an obligation to bargain with the representatives of its employees concerning the effects of the sale, pursuant to Section six of the Railway Labor Act.

Therefore, the Court is entering an Order at this time, directing Defendant Pittsburgh & Lake Erie Railroad to comply with the provisions of the Railway Labor Act concerning resolution of this dispute. The Court further is enjoining Pittsburgh & Lake Erie Railroad from altering the pay, rules and working conditions in existence at the time this dispute arose. That is, the sale of Pittsburgh & Lake Erie assets is enjoined to the extent that such sale does not include provisions for the maintenance of the status quo, that is, provisions prohibiting the alteration of the pay, rules and working conditions existing at the time this dispute arose. The injunction shall remain in effect until such time as the dispute resolution procedures set forth in the Railway Labor Act have been completed.

[10] We will be issuing a written Order to this effect, but I am entering the Order orally at this time.

Are there any questions?

MR. CLARKE: No questions, Your Honor.

MR. WYATT: Your Honor, at this time could we make an oral motion to stay the issuance of the injunction pending appeal and ask the Court to rule on that?

THE COURT: Well, I have no problem as long as the status quo does not change while an appeal is entered. I don't have any problem with that. But, that amounts to the same thing that I am entering here. I am not going to allow you to go on with the sale, if it does not contain

provisions ensuring the status quo and I will not let you do that while you take appeal.

So what I think should be done is that I should enter my injunction and you can take your appeal. And if I am incorrect, the Circuit will tell me that and then you can go on with your sale, without these provisions in it.

I also want you to know that I am not enjoining the sale completely. I am enjoining the sale, if it does not contain provisions keeping the status quo until the provisions of the Railway Labor Act have been completed.

\* \* \* \*

MR. WYATT: Your Honor, could I turn to a couple of housekeeping matters on the earlier conference call we had?

THE COURT: Fine.

MR. WYATT: We understood the Court's ruling to be that P&LE had no duty to bargain over its decision with RLEA.

THE COURT: Its decision to sell?

MR. WYATT: Yes, Your Honor.

THE COURT: That is right.

MR. WYATT: We also understand the Court's ruling to be that the sale to Railco is enjoined unless Railco agrees to assume the employees, the collective bargaining agreement, the status quo obligations and bargaining obligations of the P&LE, as found to exist by this Court.

THE COURT: That is right. As I indicated to you, I was not enjoining the sale as such. The Railroad has every right to sell, as long as they maintain the status quo.

MR. CLARKE: The RLEA doesn't disagree with that.

MR. WYATT: Will Your Honor be entering findings and conclusions?

[19] THE COURT: There really aren't any facts in dispute. We will state that we will be issuing a written opinion in the next couple of days, both in our decision that we made late last week, in the other case, as well as in this case. We will be issuing a written opinion; yes.

MR. WYATT: Under Section nine of the Norris-La-Guardia Act, I believe the Court would be obligated in this case to enter findings of fact and conclusions of law.

THE COURT: Well, yes, the findings of fact are going to be very simple because you stipulated that you have not completed the process as required by the Railway Labor Act.

We will make those findings based upon your stipulation and make conclusions of law based upon those facts and our reading of the law, as it applies to these facts. That is what we intend to do.

SUPREME COURT OF THE UNITED STATES

No. 87-1589

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION

ORDER ALLOWING CERTIORARI. Filed November 28, 1988.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. This case is consolidated with No. 87-1888, *Pittsburgh & Lake Erie Railroad Company v. Railway Labor Executives' Association, et al.*, and a total of one hour and thirty minutes is allotted for oral argument.

November 28, 1988

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12 13  
Nos. 87-1589 and 87-1888

Supreme Court, U.S.  
**FILED**

JAN 19 1989

JOSEPH E. SPANGL, JR.  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Respondent.*

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION and  
INTERSTATE COMMERCE COMMISSION,  
*Respondents.*

ON WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

G. Edward Yurcon  
THE PITTSBURGH & LAKE  
ERIE RAILROAD COMPANY  
780 Commerce Court  
Four Station Square  
Pittsburgh, Pennsylvania 15219  
(412) 263-3806  
Counsel for Petitioner

Richard L. Wyatt, Jr.\*  
Ronald M. Johnson  
Charles L. Warren  
Eric D. Witkin  
AKIN, GUMP, STRAUSS,  
HAUER & FELD  
1333 New Hampshire Ave., N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 887-4000  
Counsel for Petitioner

\*Counsel of Record

January 19, 1989

110947

## QUESTIONS PRESENTED

1. Does the Railway Labor Act require that a railroad exhaust that Act's collective bargaining procedures prior to implementing a decision to go out of business?

2. Does the Interstate Commerce Act preempt any obligation that a railroad might otherwise have to exhaust Railway Labor Act collective bargaining procedures with respect to the effects of a decision to go out of business, where the Interstate Commerce Commission, which has exclusive jurisdiction to consider the interests of labor, has expressly declined to impose labor protective provisions as a condition to its authorization of the immediate consummation of a sale of the railroad's assets?

3. Are federal district courts deprived of jurisdiction by Section 4 of the Norris-LaGuardia Act to enjoin strikes by railroad unions designed to block railroad transactions approved by the Interstate Commerce Commission, where the unions participated in the administrative proceedings approving the transaction?

4. Does an order prohibiting a railroad that is operating at a loss from going out of business until it completes the "almost interminable" collective bargaining procedures of the Railway Labor Act violate the Fifth Amendment prohibition against the taking of property without just compensation?

## LIST OF PARTIES

1. Petitioner is The Pittsburgh & Lake Erie Railroad Company, which is incorporated in Delaware with its principal place of business in Pennsylvania.

Pursuant to Supreme Court Rule 28.1, Petitioner lists the following entities as related parents, subsidiaries, affiliates, or companies in which it holds an interest:

- Pleco, Inc.
- The Montour Railroad Company
- The Youngstown & Southern Railroad Company
- The Pittsburgh, Chartiers and Youghiogheny Railroad Company
- The Monongahela Railway Company

2. Respondent is Railway Labor Executives' Association, an unincorporated association of executive officers of nineteen labor unions whose members are:

- American Railway & Airway Supervisors' Association
- American Train Dispatchers' Association
- Brotherhood of Locomotive Engineers
- Brotherhood of Maintenance of Way Employees
- Brotherhood of Railroad Signalmen
- Brotherhood of Railway Carmen
- Hotel Employees and Restaurant Employees International Union
- International Association of Machinists and Aerospace Workers

- International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers
- International Brotherhood of Electrical Workers
- International Brotherhood of Firemen & Oilers
- International Longshoremen's Association
- National Marine Engineers' Beneficial Association
- Railroad Yardmasters of America
- Seafarers' International Union of North America
- Sheet Metal Workers International Association
- Transport Workers Union of America
- Transportation Communications Union
- United Transportation Union

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Nos. 87-1589 and 87-1888

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Respondent.*

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION and  
INTERSTATE COMMERCE COMMISSION,  
*Respondents.*

ON WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Third  
Circuit are reported at 831 F.2d 1231 (3d Cir. 1987) ("*P&LE I*")

(reproduced in the Appendix to the Petition for a Writ of Certiorari in No. 87-1589 ("App. I") at A-1 to A-13), and 845 F.2d 420 (3d Cir. 1988) ("*P&LE II*") (reproduced in the Appendix to the Petition for a Writ of Certiorari in No. 87-1888 ("App. II") at 1a - 70a). The opinion of the United States District Court for the Western District of Pennsylvania is reported at 677 F. Supp. 830 (W.D. Pa. 1988) and is reproduced in App. II at 71a - 85a.

### JURISDICTION

The judgments at issue herein were entered by the Court of Appeals on October 26, 1987 (App. I at A-1 to A-13) and April 8, 1988 (App. II at 1a - 70a). The Petition for a Writ of Certiorari in No. 87-1589 was filed on March 24, 1988. The Petition for a Writ of Certiorari in No. 87-1888 was filed on May 17, 1988. The Court granted certiorari in both cases on November 28, 1988. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

### STATUTES INVOLVED

This case involves the Fifth Amendment to the United States Constitution (reproduced in the Appendix to the brief ("App.") at A-18), Sections 2, First, 5, 6 and 10 of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, *et seq.*, (reproduced in App. at A-1, A-2, A-8, A-9), Sections 10505 and 10901 of the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10505 and 10901 (reproduced in App. at A-11, A-13) and Section 4 of the Norris-La Guardia Act ("NLGA"), 29 U.S.C. § 104 (reproduced in App. at A-16).

### STATEMENT OF THE CASE

#### Sale of P&LE's Rail Lines

The Pittsburgh & Lake Erie Railroad ("P&LE") is a small rail carrier which operates about 182 miles of railroad in western Pennsylvania, Ohio, and New York. (J.A. 21, 22)<sup>1</sup> At the time this case arose, P&LE had been in severe financial decline for five years, during which time it had accumulated losses totalling \$60 million. (J.A. 22, 82) P&LE had fallen upon hard times as a result of the lessening of railroad regulation, which favored the major railroads, the closure of steel mills and other major rail shippers on P&LE's lines, and increased competition from trucking companies. (J.A. 22, 82, 84) P&LE tried to reverse its ill fortune, for example, by drastically reducing its workforce and by trying to expand its system to reach new markets. (J.A. 22, 82-83) P&LE's efforts to reverse its ill fortune did not prove successful. Today, P&LE operates at the sufferance of its major secured creditors. (J.A. 191)

Given P&LE's situation, P&LE's management decided to quit the railroad business. (J.A. 21, 29, 30) P&LE first attempted to interest a major railroad in purchasing its rail lines. None was interested. (J.A. 90) Chicago West Pullman Transportation Company ("CWPT") then approached P&LE about purchasing all of its rail lines. In July 1987, P&LE agreed to sell its rail lines to P&LE Railco, Inc. ("Railco"), a non-carrier CWPT subsidiary. (J.A. 22) Railco planned to operate with about one-third the number of

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<sup>1</sup> References to the Joint Appendix are abbreviated as ".A." followed by the appropriate page.

employees employed by P&LE. Railco stated that it would give preference to P&LE employees in establishing its workforce and invited all of P&LE's employees to submit employment applications. Railco also contacted representatives of P&LE's unions about negotiating new collective bargaining agreements to be in place at Railco's start-up. (J.A. 173)

### **Unions Demand to Bargain Over All Aspects of the Sale**

After being informed of the proposed sale on July 31, 1987, P&LE's 14 unions demanded that P&LE bargain with each of them over "all aspects of this matter including, but not limited to, the decision to sell the rail lines and other assets of the P&LE and the effects of such a transaction on P&LE's employees . . ." before consummating the sale to Railco. (J.A. 31, 32) P&LE's unions served a notice, purportedly pursuant to Section 6 of the Railway Labor Act ("RLA"), 45 U.S.C. § 156, proposing as follows:

1. No employee of the P&LE Railroad Company who [was actively employed or on authorized leave of absence] between August 1, 1986 and August 1, 1987 . . . shall be deprived of employment or placed in a worse position with respect to compensation or working conditions for any reason except resignation, retirement, death or dismissal for justifiable cause....The formulae for the protective allowances, with a separation option, shall be comparable to those established in the *New York Dock* conditions.
2. If an employee is placed in a worse position with respect to compensation or working conditions,

that employee shall receive, in addition to a make-whole-remedy, penalty pay equal to three times the lost pay, fringe benefits and consequential damages suffered by such employee.

3. P&LE agrees to obtain binding commitments from any purchaser of its rail line operating properties and assets to assume all [P&LE's] collective bargaining agreements . . . to hire P&LE employees in seniority order without physicals, and to negotiate with the P&LE and this Organization an agreement to apply this Agreement to the sale transaction and to select the forces to perform the work over the lines being acquired.

(J.A. 38, 42, 46, 50, 54, 58, 62, 66, 122, 126)

### **Unions Strike to Block Sale**

P&LE responded that the purported Section 6 notices were not valid and that it had no duty under the RLA to bargain over the sale of its business, because the sale and its effects on employees were subject to the exclusive jurisdiction of the Interstate Commerce Commission ("ICC"). (J.A. 16, 17, 33) The Railway Labor Executives' Association ("RLEA") initiated this action on behalf of P&LE's unions, seeking to enjoin the sale until P&LE completed the lengthy bargaining, mediation and cooling off procedures of the RLA. (J.A. 7) Rather than pursue RLEA's complaint for injunctive relief, however, on September 15, 1987, the unions

struck P&LE. (J.A. 17, 27)<sup>2</sup> P&LE's unions also threatened to spread the strike to P&LE's connecting carriers if they interchanged any traffic with P&LE. (J.A. 18, 22, 28) The strike had the intended effect of effectively shutting P&LE down and blocking the sale, because Railco could not finalize its financing if it would not be able to operate the railroad and generate revenue to repay its debt. (J.A. 191)

### ICC Approves Immediate Sale of P&LE's Lines

P&LE could not go out of business by selling its rail lines to Railco until the ICC approved the sale, because entry into and exit from the railroad business requires the prior approval of the ICC. See 49 U.S.C. §§ 10901 (entry), 10903 (abandonment).

Section 10901 of the ICA requires a non-carrier, like Railco, to obtain a certificate of public convenience and necessity from the ICC in order to become a carrier. 49 U.S.C. § 10901; Ex Parte No. 392, *Application Procedures For A Certificate To Construct, Acquire Or Operate Railroad Lines*, 365 I.C.C. 516 (1982); 49 C.F.R. Part 1120. Under Section 10901(c)(1)(A)(ii), the ICC has broad discretionary authority to impose conditions protective of the public

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<sup>2</sup> In yet another facet of RLEA's strategy to block the sale, RLEA filed a state court action against P&LE, Railco and others under the Pennsylvania Uniform Fraudulent Conveyance Act. RLEA sought to enjoin distribution of the proceeds of the sale and require that they be placed with a trustee until after the state court action had been litigated. P&LE removed the case to federal court, which found the state law complaint was preempted by the RLA. The Third Circuit reversed and ordered the action remanded to state court. *RLEA v. P&LE*, 858 F.2d 936 (3d Cir. 1988). Because the planned sale to Railco has terminated, RLEA dismissed its complaint.

interest. Courts have long interpreted this conditioning authority to include the power to consider the impact of an ICC-authorized transaction on employees and impose labor protective conditions for the benefit of employees on the seller or buyer of a rail line or both. See, e.g., *RLEA v. ICC*, 784 F.2d 959, 965, 969-70 (9th Cir. 1986); *Black v. ICC*, 762 F.2d 106, 116 (D.C. Cir. 1985).<sup>3</sup>

If the ICC determines that regulation is not necessary to carry out national rail transportation policy, it can exempt transactions or classes of transactions from regulatory requirements. 49 U.S.C. § 10505. After five years of experience with individual applications by non-carriers seeking to acquire marginal or failing lines by exemption from the filing requirements of Section 10901, the ICC in its rulemaking proceeding in Ex Parte No. 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901*, 1 I.C.C.2d 810 (1985) ("Ex Parte 392"), *aff'd*, *Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987), exempted the class of Section 10901 transactions involving non-carriers from the prior approval requirements of Section 10901.

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<sup>3</sup> This Court upheld the ICC's discretionary authority to require labor protective conditions under the predecessor statute to 49 U.S.C. § 10901, 49 U.S.C. § 1(18), in *ICC v. RLEA*, 315 U.S. 373 (1942). Section 1(18)-(20) granted the ICC jurisdiction over both acquisition of rail lines by a non-carrier and abandonments by carriers. When Congress recodified the ICA in 1978, without substantive change, the ICC's authority under Section 1(18) was split into Sections 10901 (acquisition and construction of lines) and 10903 (abandonment). See Pub. L. No. 95-473, 92 Stat. 1337 (1978).

Under the *Ex Parte* 392 procedures, a new operator was authorized to acquire a line of railroad and commence operations seven days after it filed its notice of exemption with the ICC. 49 C.F.R. § 1150.32(b).<sup>4</sup> The ICC concluded that allowing non-carriers expeditiously to take over marginal lines, without protracted and costly regulatory proceedings, would improve the chances that these lines could be rehabilitated and remain part of the nation's rail system. The ICC, however, retained jurisdiction over an exempted transaction, and any interested person, including labor, could seek ICC review of a particular sale by filing a petition to revoke the exemption under ICA Section 10505(d). *Ex Parte* 392, 1 I.C.C.2d at 812.

RLEA participated fully in the ICC rulemaking proceedings that led to *Ex Parte* 392. RLEA there asked the ICC to exercise its discretion and impose labor protective conditions on all transactions subject to the exemption. The ICC, however, concluded that the mechanical imposition of labor protective conditions on Section 10901 transactions was not in the public interest, because the cost of such conditions would discourage sales of marginal lines, resulting in their abandonment with a permanent loss of rail service and jobs. *Id.* at 815. The ICC provided instead that labor could seek the imposition of labor-protective conditions in any particular sale transaction by filing a petition to revoke

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<sup>4</sup> Since the now defunct sale of P&LE's lines to Railco, the ICC has amended its *Ex Parte* 392 procedures. 53 Fed. Reg. 5981 (1988); *Ex Parte* No. 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901* (decided Feb. 29, 1988). The rules, as amended, would require 35 days' advance notice before a Notice of Exemption authorizing the sale of P&LE's rail lines became effective.

the exemption and demonstrating that exceptional circumstances justified their imposition. Rail labor and other interests appealed the ICC's *Ex Parte* 392 procedures, which were affirmed in all respects in *Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

### **P&LE Sale to Railco**

On September 19, 1987, Railco filed its notice of exemption with the ICC, pursuant to *Ex Parte* 392. (J.A. 99) On behalf of P&LE's unions, which were still on strike, RLEA filed a petition to reject Railco's exemption filing and a related exemption filing by Railco's parent, CWPT. (J.A. 99) RLEA also filed with the ICC a "Complaint for Cease and Desist Order and Other Relief." (J.A. 109) In this Complaint, RLEA argued that the sale was really subject to the ICA's merger and consolidation provisions, which, if applicable, would have required the imposition of mandatory labor protective conditions on the transaction. (J.A. 110, 113-15) RLEA also requested that the ICC postpone the sale in order to consider RLEA's suggestion that P&LE's rail lines be sold to an employee-owned entity through the vehicle of an employee stock ownership plan ("ESOP"), rather than to Railco. (J.A. 97, 115-16)

The ICC refused to reject Railco's exemption notice or stay the effectiveness of the exemption, which became effective September 26, 1987. As explained in its order served September 29, 1987 in *P&LE Railco, Inc. -- Exemption Acquisition and Operation -- Lines of The Pittsburgh & Lake Erie R.R. Co. and the Youngstown & Southern Ry.*, Finance Docket Nos. 31121, 31122 and 31126, (decided September 25, 1987), the ICC found that RLEA was

not likely to succeed on the merits of its pleadings and had failed to show it would suffer irreparable harm in the absence of a stay. (App. I at E-6, E-8) Conversely, the ICC found that a stay of the sale would harm P&LE's rail operations and shippers, given P&LE's precarious financial situation, and that "[t]he public interest does not support a grant of a stay." (App. I at E-8) The ICC reminded RLEA that it should raise its concerns through a petition to revoke as provided by *Ex Parte* 392.

On October 2, 1987, RLEA finally filed with the ICC a petition to revoke the exemptions granted to Railco and its parent. (J.A. 141) Rather than ask for the imposition of discretionary labor protections, as allowed by *Ex Parte* 392, RLEA sought to block the sale altogether, arguing that P&LE was insolvent and that the ICC should consider alternatives to the sale to Railco, including RLEA's ESOP proposal. (J.A. 142, 147, 148, 153, 155) RLEA simultaneously asked the ICC to reconsider and stay consummation of the sale while alternatives to the sale were considered. (J.A. 130) In an order served October 19, 1987, the ICC denied RLEA's petition for reconsideration, but required P&LE to retain its corporate existence until after the ICC completed review of RLEA's petition to revoke. (App. I at F-2, F-3) Although all regulatory approvals were in place, P&LE and Railco could not finalize the sale because of the ongoing strike.

### Strike Injunction

On October 8, 1987, the District Court enjoined the strike. (App. I at B-9) The court held that the ICC's authorization of the sale relieved P&LE of any duty to bargain over the effects of the sale on employees and that the

Norris-LaGuardia Act must be accommodated to the ICA, relying upon the Eighth Circuit's decision in *Missouri Pacific R.R. v. UTU*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987). (App. I at B-7, B-8) On October 26, 1987, the Third Circuit in *P&LE I* summarily reversed the District Court's decision, holding that the Norris-LaGuardia Act is not accommodated to the ICA and that the District Court was therefore without jurisdiction to enjoin the strike. The Third Circuit remanded to the District Court for consideration whether the sale or strike violated the RLA. (App. I at A-13) In the meantime, P&LE's unions threatened to resume their crippling strike if P&LE tried to consummate the sale to Railco. (J.A. 187, 191)

### Permanent Injunction of Sale

On remand, the District Court held that P&LE did not have an RLA duty to bargain over its decision to go out of business, but did have a duty to bargain over the effects of that decision upon its employees. (App. II at 83a-84a) The District Court also concluded that this obligation was not superseded by the ICC's jurisdiction over the sale. (App. II at 81a) The District Court further held that the RLA's status quo requirements required that P&LE be enjoined from selling its rail lines until after it exhausted the RLA's "purposely long and drawn out" bargaining and mediation procedures, unless the purchaser agreed to hire all of P&LE's existing employees, assume P&LE's labor agreements and recognize P&LE's unions. (App. II at 84a-85a) The Third Circuit upheld the District Court's decision and status quo injunction in *P&LE II*. (App. II at 60a)

### Termination of Sale to Railco

As a result of the strike and subsequent Third Circuit decisions, Railco lost its financing and was unable to obtain new financing. Railco was also unwilling to purchase P&LE's lines on the terms required by the status quo injunction, *i.e.*, assumption of all of P&LE's employees, labor agreements and unions. Consequently, the planned sale to Railco was terminated. Petitioner's Supp. Brief, App. C at ¶ 3 (filed Nov. 22, 1988).

### RLEA Tries to Arrange Sale to Employees

Beginning in late September 1987 and until the Third Circuit summarily vacated the strike injunction, P&LE and its unions, without prejudice to their respective legal positions, exchanged proposals to address the effects of the sale on employees. (J.A. 157, 166, 170-72) From the beginning of this exchange, P&LE's unions proposed that P&LE's lines be sold to its employees. (J.A. 97, 157, 166, 170-71, 187, 189) An ESOP proposal was submitted to P&LE by RLEA's investment advisor on September 20, 1987. (J.A. 151, 158, 166) P&LE rejected the proposal, because P&LE was already contractually obligated to sell to Railco. (J.A. 164) In addition to the ESOP proposal, the unions' initial proposals requested severance payments for all P&LE employees, both those who were active and those who were laid-off, in the amount of \$45,000 each, or approximately \$70 million in total. (J.A. 167, 171) This amount exceeded the sale price from Railco. (J.A. 167)

After the sale to Railco terminated, several persons expressed interest in buying all or some of P&LE's assets. Petitioner's Supp. Brief, App. C at ¶ 4. However, as a

practical matter, P&LE could not act on any proposal without the concurrence of all of its unions. *Id.* Therefore, the second proposal considered by P&LE was a RLEA-sponsored plan to be financed by CSX Transportation, Inc. ("CSXT"), a major railroad which connects with P&LE. *Id.* at ¶ 5; (J.A. 189) Under the RLEA-CSXT proposal, P&LE's rail lines would be acquired by an employee-owned company. Ironically, this RLEA employee ownership proposal called for essentially the same reductions in employment levels and changes in work rules that would have resulted under the proposed sale to Railco, to which P&LE's unions had objected so vehemently. This proposal, like the prior ESOP proposal, was submitted by RLEA's investment advisor. RLEA was unable to obtain the agreement of all of P&LE's unions, and the RLEA-CSXT proposal was terminated. *Id.*

Although P&LE undertook effects bargaining after the Third Circuit's April 6, 1988 decision in *P&LE II*, P&LE reluctantly agreed, at RLEA's request, to forego that bargaining while RLEA pursued its latest employee ownership plan. *Id.* at ¶ 6. P&LE has now asked the National Mediation Board ("NMB") to resume mediation of the court-ordered effects bargaining. *Id.* at ¶ 8. Thus, nine months after *P&LE II*, and 16 months after the parties first exchanged effects proposals, P&LE is still locked in the RLA's procedures with no definite end in sight. While P&LE remains interested in finding a buyer for its rail lines, the Third Circuit's rulings make a sale impossible without the concurrence of all of P&LE's unions.

## SUMMARY OF ARGUMENT

In *P&LE II*, the Third Circuit concluded that under the Railway Labor Act a railroad cannot go out of business unless it first exhausts RLA bargaining with its unions over the "effects" of that decision. That ruling conflicts with the rationale underlying this Court's recognition that an employer has an "absolute" right to go out of business, *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263, 270 (1965), and that a decision to close part of a business represents a fundamental exercise of managerial prerogative over which an employer has no mandatory bargaining obligation. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The "almost interminable" collective bargaining procedures of the Railway Act make the doctrine of managerial prerogative and the non-mandatory nature of "decision" bargaining even more crucial to carriers subject to the RLA than it is to employers in industries subject to the National Labor Relations Act.

Contrary to the Third Circuit's reading of the RLA, a duty to bargain over the "effects" of a decision to go out of business does not give rise to any status quo obligation that would preclude implementation of that decision before such bargaining is exhausted. No "effects" bargaining is required where, as here, the unions' bargaining proposals seek to delay or interfere with the decision itself, or where the effects of the decision fall within the exclusive jurisdiction of the ICC. Even if some effects bargaining were proper, however, the status quo that must be maintained during such bargaining includes the employer's right to go out of business, and therefore necessarily permits the loss of jobs that accompanies the exercise of that right. See *First National*

*Maintenance*, 452 U.S. at 686. In the absence of an existing contract provision restricting the employer's right to go out of business, a union cannot block an employer's exercise of that right merely by proposing to amend the contract to include such a restriction. The Third Circuit's interpretation of a carrier's status quo obligation stands the status quo requirement on its head, and gives the unions the "powerful tool for achieving delay . . . that might be used to thwart management's intentions" that this Court has previously rejected. See *id.* at 683.

If the Court finds that the RLA does not require effects bargaining when a carrier decides to go completely out of business, then there is no conflict between the RLA and the ICA. However, even if the Court finds that carriers generally have a duty to bargain over the effects of management decisions regarding the scope of the business, the Court should find that any such bargaining obligation was superseded here by the ICC's exclusive jurisdiction to approve, on such terms and conditions as it finds in the public interest, P&LE's management decision to go out of business. Under the ICA, P&LE cannot close operations as a railroad without prior ICC approval. Congress, moreover, has treated the issue of labor protection to address employee impacts of ICC-regulated transactions in the ICA.

The Third Circuit refused to accommodate the RLA or NLGA to the ICA, because the Third Circuit concluded that such an accommodation would repeal the RLA by implication. When several federal statutes address the same subject, under this Court's precedents the proper analytical approach is to reconcile them "to 'make sense' in combination . . . ." *United States v. Fausto*, 108 S. Ct. 668,

676 (1988). This is particularly true where, as here, what is allegedly being repealed by implication is not express statutory text, but implications derived by the court from the RLA. Nothing in the text of the RLA requires that a carrier remain in business during effects bargaining. Conversely, the express text of the ICA gives the ICC exclusive jurisdiction over P&LE's decision to go out of business and the effects of that decision on employees, shippers and others who may be affected by that decision. At rail labor's request, Congress gave detailed treatment to labor protection matters in the ICA, not in the RLA. For more than 50 years, rail labor has looked exclusively to the ICC's labor protection authority to address the employee impacts of ICC-regulated transactions. By failing to give any effect to the congressional policies in the ICA, the Third Circuit has frustrated Congress' intent that the ICC be the final arbiter of a national transportation policy, which encourages the sale of marginal rail lines, such as P&LE's, to new operators.

The Third Circuit also failed to follow this Court's accommodation precedents by refusing to accommodate the ICA to the NLGA's general ban of injunctions in labor disputes. This Court has accommodated the NLGA to other statutes enacted as part of a pattern of federal labor law. *E.g.*, *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957). Congress' historical treatment of labor protection in the ICA was part of the pattern of legislation dealing with railway labor. Additionally, the strike was separately enjoinable as a violation of the RLA, because the unions were seeking to compel P&LE to bargain over a non-mandatory subject (its decision to sell to Railco), and engaged in self-help prior to the exhaustion of the RLA's

procedures for resolving their effects proposals, if in law there was an effects bargaining obligation.

Finally, in failing to accommodate the ICA, RLA and NLGA, the Third Circuit adopted a statutory interpretation that unnecessarily gave rise to a constitutional infirmity. Here, the Third Circuit's construction of the RLA and NLGA resulted in a taking of P&LE's property, in violation of the Fifth Amendment.

## ARGUMENT

### I. The Railway Labor Act Does Not Require That A Railroad Exhaust That Act's Collective Bargaining Procedures Before Implementing A Decision To Go Out Of Business

#### A. A Railroad's Decision To Go Out Of Business Is A Fundamental Managerial Prerogative Over Which It Has No Duty To Bargain

##### 1. Decisions Regarding The Existence, Scope And Direction Of An Enterprise Are Peculiarly Matters Of Managerial Prerogative That Need Not Be Bargained

As this Court has recognized in several contexts, certain decisions are so fundamental to the existence and management of a business that they may be made without regard to their potential impact on employees. In *Textile Workers v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965) ("*Darlington*"), this Court held that an employer does not unlawfully interfere with its employees' rights under Section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), by going out of business entirely, even if motivated by anti-union animus, because "an employer has the *absolute right* to terminate his entire business for any reason he pleases . . . ." 380 U.S. at 268 (emphasis added). "A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative

intent or unequivocal judicial precedent . . . . We find neither." *Id.* at 270.

This Court explained that "a complete liquidation of a business yields no . . . future benefit for the employer" vis-a-vis its employees, because "[t]he closing of an entire business . . . ends the employer-employee relationship; the force of such a closing is entirely spent as to that business when termination of the enterprise takes place." *Id.* at 272, 274. The Court specifically recognized that just as employees are free to quit their employment, so too may an employer "withdraw from that status with immunity, so long as the obligations of any employment contract have been met." *Id.* at 271. Such reciprocal rights to terminate the employment relationship are grounded in "the very permanence" of such actions. *Id.* at 272.

In *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964), this Court held that the replacement of existing bargaining unit employees with those of an independent contractor was a mandatory subject of bargaining under the NLRA, but distinguished the nature of that decision from one which would "alter the Company's basic operation." 379 U.S. at 213. The Court noted that "to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business." 379 U.S. at 213. In a concurring opinion, Justice Stewart explored the scope of the duty to bargain, rejecting a broad interpretation of the NLRA's phrase "conditions of employment" that would have required an employer to bargain over "any subject which is insisted upon as a prerequisite for continued employment." 379 U.S. at 221. Although he noted that certain subjects which "concern the very existence of the employment itself,"

such as discharge, seniority, and compulsory retirement, are mandatory bargaining subjects, *id.* at 222, Justice Stewart distinguished them from other management decisions which could "clearly imperil job security, or indeed terminate employment entirely," such as the decision to liquidate and go out of business. Those decisions, he explained, "lie at the core of entrepreneurial control" and therefore "are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment." *Id.* at 223.

In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), this Court adopted Justice Stewart's analysis in addressing the scope of an employer's duty to bargain over a decision to close part of its operations. The Court held that a decision to terminate part of a business was not a mandatory subject of bargaining because it was not part of the "wages, hours, and other terms and conditions of employment" over which an employer must bargain under the NLRA. See *id.* at 686. The Court reasoned that mandatory subjects of bargaining were only those "amenable to resolution through the bargaining process." *First National Maintenance*, 452 U.S. at 678.

[I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

*Id.* at 679.<sup>5</sup> Applying this test, the Court explained that the decision to shut down part of a business is not amenable to resolution through the bargaining process because a "union's practical purpose in participating . . . will be . . . to delay or halt the closing." *Id.* at 681.

Labeling this type of decision mandatory could afford the union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose.

*Id.* at 683. This Court therefore concluded that although bargaining over a decision to close part of a business was *permitted*, the decision itself was not among the terms and conditions of employment over which Congress *mandated* bargaining.

## 2. The Practical Effect Of The Third Circuit's Decision Is To Eliminate The Managerial Prerogatives Of RLA Employers

Characterizing this case as a dispute over the effects on P&LE's employees of its decision to go out of business rather than one over the decision (App. II at 16a), the Third Circuit nevertheless appeared to recognize that, as a practical matter, its conclusion that P&LE had a duty to exhaust

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<sup>5</sup> The Court cautioned that "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed," and "there is an undeniable limit to the subjects about which bargaining must take place." *Id.* at 676.

bargaining over the effects of its decision prior to implementation would give the unions a virtual veto power over the decision itself. (App. II at 17a, 57a) That power is a consequence of the cumbersome bargaining procedures mandated by Section 6 of the RLA, 45 U.S.C. § 156, which this Court has described as "purposely long and drawn out," *Brotherhood of Steamship Clerks v. Florida East Coast R.R.*, 384 U.S. 238, 246 (1966), and "almost interminable," *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 149 (1960). See *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). An RLA employer is not free to resort to "self help" -- that is, to implement a proposed change in agreements -- until the bargaining procedures of Section 6 are exhausted, a release has been obtained from the National Mediation Board, and, in some cases, a Presidential Emergency Board has been created and has recommended a solution. 45 U.S.C. §§ 156, 160; see *Jacksonville Terminal*, 394 U.S. at 378. Most business transactions--even those in which time is not expressly of the essence--simply cannot await completion of an "almost interminable" process before consummation. As this Court noted in *First National Maintenance*, a union will have little incentive to complete the bargaining process quickly where the end result is certain to be the loss by its members of their jobs. 452 U.S. at 681. The protracted nature of the RLA bargaining process gives the unions the "powerful tool for achieving delay" that this Court decried in *First National Maintenance*. 452 U.S. at 683.

The "absolute" right to "decide" to go out of business is rendered meaningless if an employer, while nominally free to make that decision, cannot implement it without first

exhausting its bargaining obligation over the effects. Although this Court held in *First National Maintenance* that under Section 8(a)(5) of the NLRA a union must be given a meaningful opportunity to bargain over effects, 452 U.S. at 681-82, nothing in that case suggests that such bargaining must reach an impasse before the decision can be implemented. Indeed, where the nature of the transaction at issue permits only very short notice to the unions it may be impossible to reach an impasse by the time the transaction occurs. The clear implication of *First National Maintenance* is thus that bargaining over effects need *not* be completed before a non-bargainable decision can be implemented.<sup>6</sup>

Furthermore, in applying the effects bargaining obligation, the courts as well as the NLRB have tailored the timing and scope of the employer's duty to bargain to the requirements of the transaction, finding no duty to bargain over effects prior to the transaction where to do so would be

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<sup>6</sup> Even if *First National Maintenance* could be read to require the exhaustion of effects bargaining prior to implementation of a decision, that ruling should not be extended to cases arising under the RLA. Under the NLRA, the parties are required to bargain only until they reach impasse, and need not await a determination by a government agency of when impasse has been reached. By contrast, under the RLA only the National Mediation Board may determine when further bargaining or mediation would be fruitless, and even then the parties must wait another thirty days before engaging in self help. This process frequently takes months, if not years, to complete. See *IAM v. NMB*, 425 F.2d 527 (D.C. Cir. 1970). In contrast to the bargaining procedures under the NLRA, the bargaining procedures of Section 6 of the RLA are totally incompatible with the "need for speed, flexibility, and secrecy" that often accompanies business transactions. See *First National Maintenance*, 452 U.S. at 682-83; *IAM v. Northeast Airlines, Inc.*, 473 F.2d 549, 557 (1st Cir.), cert. denied, 409 U.S. 845 (1972).

impractical or would be tantamount to bargaining over the decision itself.<sup>7</sup>

Although *Darlington* and *First National Maintenance* were decided under the NLRA, there is no reason in logic or law to conclude that an employer's right to make fundamental management decisions is any less broad under the RLA. The scope of the duty to bargain under the RLA is, if anything, narrower than the duty to bargain under the NLRA.<sup>8</sup> See *Inland Steel Co. v. NLRB*, 170 F.2d 247, 254-55

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7 See, e.g., *Yorke v. NLRB*, 709 F.2d 1138, 1143-44 (7th Cir. 1983) (no prior bargaining over effects required before "emergency" closing of plant); *IAM v. Northeast Airlines, Inc.*, 473 F.2d 549, 558 (1st Cir.), cert. denied, 409 U.S. 845 (1972) ("To allow the Union to force a company to bargain about the effects of its management decisions to the extent of forcing it to forego the proposed change in operations would be in effect to take away from it the freedom to make the decision in the first place."); *Raskin Packing Co.*, 246 N.L.R.B. 78 (1979); *National Terminal Baking Corp.*, 190 N.L.R.B. 465 (1971).

8 Section 8(d) of the NLRA, 29 U.S.C. § 158(d), defines the mandatory subjects of bargaining under that Act as "wages, hours, and other terms and conditions of employment." Section 6 of the RLA, 45 U.S.C. § 156, lists as mandatory subjects of bargaining those matters "affecting rates of pay, rules, or working conditions". The original Taft-Hartley bill, which had been passed in the House of Representatives, contained a specific listing of issues subject to mandatory bargaining. H.R. 3020, 80th Cong., 1st Sess.(1947), reprinted in 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 166-67 (1948). However, this "attempt to 'strait-jack[e]t' and to 'limit narrowly the subject matters appropriate for collective bargaining' was rejected in conference in favor of the more general language adopted by the Senate and now appearing in § 8(d)." *Ford Motor Co. (Chicago Stamping Plant) v. NLRB*, 441 U.S. 488, 495-96 (1979).

Significantly, the bill which was originally introduced in the Senate had used the phrase "other working conditions", the term which

(7th Cir. 1948), *aff'd on other grounds sub nom. American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).<sup>9</sup>

A decision to go out of business is the quintessential managerial prerogative. If an employer may not make *that* decision without first bargaining with its unions, this Court's decisions in *Darlington* and *First National Maintenance* are virtually meaningless.<sup>10</sup> Such a decision is at the "core of

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defines the scope of mandatory bargaining under Section 6 of the RLA, instead of "other conditions of employment" to define the scope of mandatory bargaining under the NLRA. Senator Wagner, however, strongly objected to the use of the term "working conditions", which he viewed as narrowing the scope of collective bargaining. "By substituting the narrower term 'working conditions' for the broader term 'conditions of employment', the bill would narrow the scope of collective bargaining to exclude many subjects . . . ." 93 Cong. Rec. 3322, 3323 (1947). The Senate subsequently passed the Taft-Hartley Act including the language "other conditions of employment" rather than "working conditions."

9 See also Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 393 (1950) ("'Conditions of employment' is a broader phrase than working conditions.").

10 In *First National Maintenance* this Court described its decision in *Order of R.R. Telegraphers v. Chicago & North Western R.R.*, 362 U.S. 330 (1960), as involving a request by a union that a railroad "bargain over its decision to close down certain stations, thereby eliminating a number of jobs." 452 U.S. at 686 n.23. The Court went on to distinguish its holding in *First National Maintenance* from that in *Telegraphers*, referring, *inter alia*, to its "expansive" interpretation of a railroad's bargaining obligation under Section 2, First, 45 U.S.C. § 152, First, and to the "aims of Railway Labor Act and national transportation policy." *Id.* at 686-87. Despite this Court's description of *Telegraphers* in *First National Maintenance*, *Telegraphers* did not involve a union request to bargain over the railroad's decision to close stations; rather, the dispute centered on the union's proposal to amend the existing collective

entrepreneurial control" and is no less fundamental and central to an RLA employer than it is to an NLRA employer. *See IAM v. Northeast Airlines, Inc.*, 473 F.2d at 556-57 (no duty to bargain over decision to merge operations with another airline); *Japan Air Lines Co. v. IAM*, 538 F.2d 46, 52 (2d Cir. 1976) ("Whatever . . . benefits may nonetheless accrue to Union members from implementation of [the union's Section 6 proposal] are outweighed by [the carrier's] proper interest in retaining basic control over the size and direction of its enterprise."); *ALPA v. Transamerica Airlines, Inc.*, 123 L.R.R.M. (BNA) 2682, 2687 (E.D.N.Y. 1986) (there is "no reason . . . why [a] . . . carrier should be required to bargain over its decision to go completely out of business, solely because it is covered by the RLA.").

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bargaining agreement by adding a provision forbidding the abolishment of any position in existence as of a certain date except by agreement with the union. 362 U.S. at 332. *See* 452 U.S. at 336 ("Plainly the controversy here relates to an effort on the part of the Union to change the 'terms' of an existing collective bargaining agreement.") (emphasis added); 452 U.S. at 341 ("The . . . dispute grew out of the failure of the parties to reach agreement on the contract change proposed by the union.") (emphasis added). Although the Court held that the union's proposal was a lawful subject of bargaining, *Telegraphers* did not address at all the railroad's right to close the stations while such bargaining took place.

**B. Neither The Loss Of Jobs That Would Result From P&LE's Decision To Go Out Of Business Nor The Unions' Bargaining Proposals Gave Rise To A Status Quo Obligation Under The RLA That Would Preclude Implementation Of P&LE's Decision**

The Third Circuit held that bargaining over the effects of the decision to go out of business was required for two reasons. First, the court found that the "loss of jobs by possibly two-thirds of the employees [that would result from the decision] clearly would require a 'change in agreements affecting rates of pay, rules, or working conditions,'" which could not be unilaterally imposed without bargaining. (App. II at 17a) Second, the court found that "even if that were not the case, P&LE's unions have proposed substantial changes to the agreements" as a result of which P&LE had to "preserve...those actual, objective working conditions and practices, broadly conceived, which were in effect" when the dispute arose, which "plainly include the very existence of the workers' jobs." (App. II at 18a) As shown below, neither the loss of jobs that would result from P&LE's decision nor the changes in agreements proposed by the unions gave rise to any status quo obligation that would preclude P&LE from going out of business.

**1. P&LE's Decision To Go Out Of Business Did Not Require A Change In Rates Of Pay, Rules, Or Working Conditions**

Acknowledging that going out of business might not violate P&LE's collective bargaining agreements, the Third

Circuit nevertheless asserted that going out of business would "change the nature of those agreements" and thus would create a "major" dispute<sup>11</sup> under the RLA. (App. II at 18a (emphasis in original)) "Whenever a party intends to implement such a change, the RLA requires that the party submit to the major dispute resolution process and not alter the status quo." *Id.* The Third Circuit's reasoning is in fundamental conflict with the principles underlying *Darlington*, *Fibreboard*, *First National Maintenance*, and other cases recognizing that certain rights are inherently those of management, and remain within management's prerogative except to the extent modified by legislation or collective agreement. The RLA does not by its terms restrict management's exercise of such rights, but rather merely creates a process by which such restrictions may be bargained.<sup>12</sup> In the absence of an express contractual provision, a collective bargaining agreement does not constitute a guarantee of employment, but rather only sets out

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11 "Major" disputes are those over the formation of collective bargaining agreements or efforts to secure them. "They arise where there is no such agreement or where it is sought to change the terms of one . . . . They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1945), *opinion adhered to*, 327 U.S. 655 (1946). In contrast, "minor" disputes relate "either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . . [T]he claim is to rights accrued, not merely to have new ones created for the future." *Id.*

12 See *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 402-03 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937); *Texas & New Orleans R.R. Co. v. Brotherhood of Ry. Steamship Clerks*, 281 U.S. 548, 571 (1930); *United States Steel Corp. v. Nichols*, 229 F.2d 396, 399-400 (6th Cir.), *cert. denied*, 351 U.S. 950 (1956).

the terms of any employment that is available. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334-35 (1944). The unions made no claim here that their contracts contained any such express guarantees of employment or any prohibitions on P&LE's right to go out of business.<sup>13</sup> The loss of jobs thus would not "change" the agreements in any respect.

The Third Circuit cites *Order of R.R. Telegraphers v. Chicago and North Western Ry.*, 362 U.S. 330 (1960), for the proposition that the RLA mandates bargaining "when a decision affects the very existence of the workers' jobs." (App. II at 21a) *Telegraphers* involved a union bargaining proposal relating to a railroad's decision to close several underutilized stations and to consolidate certain work in a central location, as a result of which employees would be furloughed. 362 U.S. at 332. Unlike P&LE, the railroad in *Telegraphers* intended to *continue* operating along the same right of way under *different* conditions; it did not intend either to cease operating altogether or to stop performing the work performed by the employees whose jobs were to be abolished. The railroad refused to bargain over the union's Section 6 proposal that positions not be abolished except by agreement between the carrier and the union, 362 U.S. at 332, claiming that the union's proposal was improper. The railroad sought to enjoin the union's strike over its refusal to bargain.

The ultimate issue in *Telegraphers* was whether the Norris-La Guardia Act prohibited a strike injunction in these circumstances. See 362 U.S. at 331, 335, 343. The Court

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13 Indeed, the record shows that P&LE had furloughed more than two-thirds of its unionized workforce. (J.A. 82, 83)

rejected the railroad's contention that the union's bargaining proposal was an unlawful attempt to bargain over the decision itself, 362 U.S. at 338-40, finding instead that the change the union sought was a lawful bargaining subject, and thus that the Norris-LaGuardia Act did not permit a strike injunction. 362 U.S. at 335, 342-43. *Telegraphers* did not discuss whether a duty to bargain would have arisen in the absence of the union's proposal to amend the agreement. Nothing in *Telegraphers* can fairly be read to imply that the loss of jobs that would result from the railroad's decision standing alone would give rise to a duty to bargain.<sup>14</sup> So understood, *Telegraphers* is fully consistent with P&LE's position herein.

The Third Circuit erroneously confused a railroad's duty to bargain upon receipt of a proper Section 6 notice with a duty to refrain from taking action before bargaining takes place. *Telegraphers* does not support that proposition, and the rationale of *Darlington*, *First National Maintenance*, and a host of other cases is to the contrary. Like the NLRA, the RLA simply imposes no status quo on an employer that would prevent it from implementing a decision to go out of business.

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<sup>14</sup> The Third Circuit also relied on the twenty-three-year-old decision in *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965). (App. II at 23a) *Galveston Wharves* is plainly inconsistent with the rationale of *Darlington* and predates this Court's decision in *First National Maintenance*. Moreover, the facts of *Galveston Wharves* much more closely resemble the decision to subcontract in *Fibreboard* than the decision to go completely out of the railroad business at issue here.

**2. The Unions' Section 6 Notices Did Not Create Any Status Quo Obligations That Would Prevent P&LE From Going Out Of Business**

**a. The Unions' Proposals Improperly Sought To Bargain Over The Decision Itself**

Without discussing the actual content of the unions' Section 6 notices, the Third Circuit held that the service of such notices created a "major dispute" and a status quo obligation prohibiting P&LE from going out of business. Even a brief examination of the notices reveals that they would have required P&LE to renegotiate the sales agreement to the disadvantage of Raico.<sup>15</sup> Under the circumstances, the proposals were unreasonable and P&LE could legitimately refuse to entertain them. See *Northeast Airlines*, 473 F.2d at 558-59, cited with approval in *First National Maintenance*, 452 U.S. at 683 n. 20.

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<sup>15</sup> J.A. 38, 42, 46, 50, 54, 58, 62, 66, 122, 126; see *supra*, pp. 4-5. The unions proposed to amend the existing agreements to provide, in effect, lifetime guaranteed employment, compensatory and treble damages for any employee who received anything short of lifetime employment, and a requirement that P&LE agree to require any purchaser of its assets to assume all collective bargaining agreements with, and obligations to, P&LE's union-represented employees.

**b. The Filing Of Section 6 Notices  
Cannot Serve To Eliminate An  
Existing Managerial Prerogative  
During Bargaining**

The right to exercise "management prerogatives" recognized in this Court's decisions in *J.I. Case*, *Darlington*, *Fibreboard*, and *First National Maintenance* is part of the "status quo" -- the "actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Shore Line*, 396 U.S. at 153. The Third Circuit failed to recognize that unless expressly restricted by an express or implied agreement between the parties, fundamental management rights are also part of the status quo. Mere service of a Section 6 notice does not prevent an employer from exercising rights that it could have exercised in the absence of such a notice. As the Third Circuit had previously held in *Baker v. UTU*, 455 F.2d 149 (3d Cir. 1971), "[i]f management had had the ability . . . before the notice, depriving it of that ability . . . throughout the long, deliberately drawn out process of negotiations and mediation under the Act, would not be a continuation of any prior existing condition. It would be the creation of a new condition." 455 F.2d at 157.

Like the RLA, the NLRA also imposes a status quo obligation during bargaining. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 108 S. Ct. 830, 833 n.5 (1988); *First National Maintenance*, 452 U.S. at 674-75; *NLRB v. Katz*, 369 U.S. 736 (1962). Yet, as noted above, implicit in this Court's ruling in *First National Maintenance* is a conclusion that bargaining over the effects

of a decision need not be completed before the decision is implemented. *See supra* pp. 22-23. This conclusion flows from the fundamental nature of a decision to go out of business and the recognition that the loss of jobs resulting from such a decision does not constitute a violation of that status quo requirement. In this respect, the RLA status quo obligation is no different than that under the NLRA.

Nothing in *Shore Line* is to the contrary. *Shore Line* dealt with a carrier's proposed unilateral change in the location at which its employees reported for work assignments, not with the cessation of a carrier's operations or even with the elimination of jobs. The Court explained that the status quo includes both written agreements and "omitted cases." 396 U.S. at 154-55.<sup>16</sup> The discussion of the "status quo" in *Shore Line* was based in large part on the peculiar practice in the railroad industry of leaving substantial portions of what would otherwise be "rules or working conditions" out of written collective bargaining agreements. 396 U.S. at 153-54. The Court sought to make clear that the status quo included not only express written agreements but also "omitted" or uncovered working conditions which would fairly be said to have been mutually agreed to by the parties. Nothing in *Shore Line* suggests that an agreement to remain in business could ever be inferred from the mere existence of employment, or that the

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<sup>16</sup> *See Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1945). In that case, this Court explained that an omitted case refers to "some incident of the employment relation or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries." *Id.*

employer's continued operations could be considered an "omitted" condition.

The logic of *Shore Line* extends only to true *conditions* of work, not to the *existence* of the employer at all. The Third Circuit's reading of *Shore Line* simply cannot be squared with this Court's pronouncement in *Darlington* that "an employer has the absolute right to terminate his entire business for any reason he pleases," 380 U.S. at 268, or with its ruling in *J.I. Case* that a collective bargaining agreement does not constitute a guarantee of employment. 321 U.S. at 334-35. Certainly, *Shore Line* does not constitute the "unequivocal judicial precedent" which *Darlington* requires before a court could even "entertain" the proposition adopted by the Third Circuit.<sup>17</sup>

The issuance of an injunction against the sale to Railco effectively gave the unions and the employees benefits that they had not obtained through bargaining. The Third Circuit analysis stands the status quo requirement on its head and allows a union, by the artful use of a carefully worded Section 6 notice, to interfere in and frustrate management decisions in which it has no legitimate right to participate.

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<sup>17</sup> The Third Circuit's reliance on *Telegraphers* to infer a status quo obligation was misplaced. Nothing in *Telegraphers* supports the proposition that implementation of a decision to go out of business may be enjoined pending exhaustion of RLA bargaining procedures merely because it may affect "the very existence" of jobs. See *supra* pp. 29-30. It was the union's Section 6 proposal, not the railroad's decision to close some stations, that this Court found to be a lawful subject of bargaining.

## II. The ICC's Exclusive Jurisdiction Over Railroad Line Sales Supersedes Any RLA Duty To Bargain Over Effects

Even if this Court were to conclude that the RLA required that P&LE exhaust bargaining over the effects of its decision before it could go out of business, any such obligation was superseded by the ICC's exclusive jurisdiction over the acquisition of rail lines by a non-carrier like Railco, which includes authority to consider the effects of the sale on employees and impose labor protective conditions for the benefit of affected employees.

### A. The ICC Has Exclusive Jurisdiction Over The Sale Of P&LE's Rail Lines

As this Court has previously recognized, "[t]he Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes and has consequently presented recurring pre-emption questions from the time of its enactment." *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). Because railroads are infused with the public interest, unlike other businesses they cannot unilaterally implement management decisions to expand or shrink their systems, or go out of business, but must first obtain ICC approval. See 49 U.S.C. § 10901(a) (acquisition of line by non-carrier); § 10903 (abandonment); §§ 11341-47 (mergers and consolidations).

In the mid-1970's, concern that over-regulation was contributing to the economic decline of the nation's railroads led Congress to streamline ICA regulation in the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R

Act”), Pub. L. No. 94-210, 90 Stat. 31, and later the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895.<sup>18</sup> Although the the 4R and Staggers Acts created procedures to encourage new entrants to take over marginal operations, they did not eliminate the ICA requirement that ICC approval be obtained before a railroad could go out of business by selling or abandoning its rail lines.<sup>19</sup>

The Third Circuit found in *P&LE II* that *Ex Parte* 392, pursuant to which the ICC approved the P&LE sale, was consistent with the “strong congressional policy to remove regulatory burdens and to expedite sales of struggling railroads . . . .” (App. II at 33a) Nonetheless, building on its erroneous conclusion in *P&LE I* that rail labor only had a “small voice of protest” at the ICC (App. I at A-12), the Third Circuit further concluded that the “interests of labor are, at best, only a relatively small concern of the ICC.” (App. II at 48a) The Third Circuit further concluded that, because Congress did not amend the RLA to parallel changes to the ICA made by the 4R and Staggers Acts, Congress intended to leave “the RLA intact as the mechanism for labor to assert its own interests.” (App. II at 48a) There was no need to amend the RLA, however, because Congress had

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<sup>18</sup> Congress was especially concerned that regulatory delay in allowing railroads to restructure their operations, including abandonment of unprofitable lines, was draining their financial health. See, e.g., S. Rep. No. 94-499, 96th Cong., 2d Sess. 102, 106-07 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 14-15, 121-22.

<sup>19</sup> Where the purchaser will operate the rail lines, the ICC has interpreted the ICA not to require that the selling carrier also obtain abandonment authorization. See, e.g., *RLEA v. United States*, 697 F.2d 285, 286 (10th Cir. 1983).

already given detailed treatment of the effects of ICC-regulated transactions on employees in the ICA. This treatment clearly evidenced Congress’ intent that the ICC’s exclusive jurisdiction encompassed the effects on employees of transactions approved by it, including line sales. Otherwise, if the effects of ICC-regulated transactions were left to the RLA, application of the RLA would threaten the consummation of ICC-approved transactions and frustrate national transportation policy. See, e.g., *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424, 451 (8th Cir.), cert. denied, 375 U.S. 819 (1963). Indeed, for more than 50 years, rail labor has not applied the RLA procedures to address employee impacts of ICC transactions, but has looked to the labor protective authority of the ICC. Congress’ treatment of labor protection in the ICA was at the request of labor, which has had a significant influence in shaping the ICA, in particular its labor protective provisions. See, e.g., *Simmons v. ICC*, 760 F.2d 126, 130 (7th Cir. 1985), cert. denied, 474 U.S. 1055 (1986).

**B. Congress Intended That The Effects Of Sales Of Lines Be Addressed Exclusively By The ICC**

**1. Congress Addressed The Effects Of ICC-Regulated Transactions In The ICA**

Originally, the ICC’s authority to consider employee impacts derived from its general authority to impose such conditions on transactions which it found to be in the public interest. *United States v. Lowden*, 308 U.S. 225, 233-35 (1939). Recognizing that implementation of the national transportation policy of encouraging railroad mergers “will

unavoidably subject railroad labor relations to serious stress," this Court upheld the ICC's discretionary authority to impose conditions addressing the effects on labor. *Id.* at 233. The ICC would not have needed such authority, of course, if the RLA had been understood to provide a mechanism to obtain such protections. *Id.* at 235-36.

In 1940, Congress passed the Transportation Act of 1940, 54 Stat. 906, one of the principal purposes of which "was to provide mandatory protection for the interests of employees affected by railroad consolidations." *RLEA v. United States*, 339 U.S. 142, 148 (1950). The 1940 Act added Section 5(2)(f) to the ICA (now 49 U.S.C. § 11347), which mandated that the ICC impose at least a minimum level of protection in merger cases, making "mandatory with respect to unifications the protections for workers that had previously been discretionary." *ICC v. RLEA*, 315 U.S. 373, 379 (1942).<sup>20</sup> In enacting Section 5(2)(f), Congress rejected an alternative resolution of the labor protection issue, the Harrington Amendment. Under the Harrington Amendment, a merger could be authorized by the ICC only upon condition that no employees of the involved carriers be adversely affected. *See, e.g., RLEA v. United States*, 339 U.S. at 150-51. Because mergers necessarily have adverse impacts on employees, "the Harrington Amendment . . . threatened to prevent all consolidations to which it related." *Id.* at 151.

In 1942, this Court again addressed the scope of the ICC's discretionary labor protection authority in *ICC v.*

<sup>20</sup> The ICA does not use the shorthand term labor protection, but speaks in terms of "a fair arrangement" for affected employees. *See, e.g.*, 49 U.S.C. § 11347.

*RLEA*, 315 U.S. at 373. The Court held that the ICC had discretionary authority to impose labor protective conditions on its approval of abandonments. The Court applied the same reasoning as in *Lowden* in concluding that the interests of labor must be factored into the national transportation policy, because abandonments had direct impacts on employees. 315 U.S. at 378-79. Courts have similarly interpreted the ICC's jurisdiction over acquisitions of rail lines to include discretionary authority to impose labor protective conditions. *See, e.g., Black v. ICC*, 762 F.2d 106, 111, 116 (D.C. Cir. 1985).

When enacting the 4R and Staggers Acts, Congress realized that employees would lose their jobs or otherwise be adversely impacted by carrier actions taken pursuant to those Acts' initiatives. This was not lost on rail labor, who pressed Congress to address employee impacts in the ICA.<sup>21</sup> Consequently, in the 4R Act, Congress increased the statutory minimum level of labor protection the ICC was required to impose in mergers. Pub. L. No. 94-210, § 402(a).<sup>22</sup> Congress also made mandatory the imposition of labor protective conditions on abandonments of less than a

<sup>21</sup> *See, e.g., Railroads - 1975: Hearings on Legislation Relating to Rail Passenger Service Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 1104-07 (1975) (testimony of W. G. Mahoney, Counsel, RLEA); *Railroad Revitalization: Hearings on H.R. 6351 and H.R. 7681, Before the Subcomm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 382 (1975) (testimony of C.J. Chamberlain, Chrm'n, RLEA) and 594 (testimony of C.L. Dennis, Int'l Pres., Bhd. of Ry., Airline & S.S. Clerks).

<sup>22</sup> *See, e.g., New York Dock Ry. v. United States*, 609 F.2d 83, 88-90 (2d Cir. 1979).

railroad's entire system where the ICC's imposition of such conditions had previously been discretionary. *Id.* § 802 (amending 49 U.S.C. § 1a(4), recodified at 49 U.S.C. § 10903(b)(2)).

Labor stated its opposition to further deregulatory initiatives, unless labor protective provisions were added to the ICA protecting employees "from all adverse effects of the legislation." *Railroad Deregulation Act of 1979: Hearings Before the Subcomm. on Surface Transp. of the Senate Commerce Comm.*, 96th Cong., 1st Sess. 961 (1979) (testimony of W. G. Mahoney, Counsel, RLEA); *see also id.* at 926, 957-62. Accordingly, Congress also gave "extensive consideration" to labor protection issues in the Staggers Act. *Simmons v. ICC*, 766 F.2d 1177, 1181 (7th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). When Congress made it easier for an existing railroad to construct a new rail line, Pub. L. No. 96-448, § 221, Section 10901(e) was added to require that, if the ICC imposed discretionary labor protections, it had to impose at least a statutorily prescribed minimum level. Congress otherwise left undisturbed the ICC's discretionary authority whether and what level of labor protections to require in Section 10901 transactions.<sup>23</sup> Where the Staggers

<sup>23</sup> The Third Circuit's analysis erroneously assumed that the ICC's authority to impose discretionary labor protections in sales to non-carriers derived from 49 U.S.C. § 10901(e). *P&LE I* (App. I at A-8); *P&LE II* (App. II at 34a). Section 10901(e), which was added by the Staggers Act, Pub. L. No. 96-448, § 221, has nothing to do with this case. Subsection (e) is concerned with labor protection when the ICC approves the construction of a new rail line by an existing carrier. The ICC's authority to require labor protective conditions in sales of existing lines to non-carriers is found in Section 10901(c)(1)(A)(ii). *See, e.g., Black v. ICC*, 762 F.2d 106, 111, 116 (D.C. Cir. 1985); *Ex Parte 392*, 1 L.C.C.2d at 815.

Act authorized the ICC to require the sale of marginal lines to a new operator, it required that the new operator operate the line with employees hired from the selling carrier "to the maximum extent practicable." 49 U.S.C. § 10910(e). The ICC was also required to impose labor protections on the selling carrier for the benefit of its employees affected by such sales. *Id.* § 10910(j); *see also* Pub. L. No. 96-448, § 219(g) (requiring that rate bureau employees who lost their jobs because of the Staggers Act receive labor protections); *id.* § 223 (authorizing the ICC to impose discretionary protections on reciprocal switching arrangements); *id.* § 227 (requiring Bankruptcy Court to impose labor protections on abandonment of lines by bankrupt railroad).

During congressional consideration of predecessor legislative proposals to the Transportation Act of 1940, Congress rejected a proposal that "protection of the employees was a matter that could be better handled by negotiation and agreement . . . ." under the RLA and instead left responsibility for labor protection with the ICC, thereby ensuring that labor disputes over labor protection would not block ICC-approved consolidations.<sup>24</sup> To the extent that such inaction indicates Congress' intent, that inaction

<sup>24</sup> *Hearings on Omnibus Transportation Bill: Before the House Comm. on Interstate and Foreign Commerce*, 76th Cong., 1st Sess. 1722 (1939) (Vol. 2)(testimony of ICC Commissioner Eastman). The legislation recommended by Commissioner Eastman would have exempted railroad mergers from federal antitrust law and other federal and state law, except the RLA, stating "[n]othing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act, as amended, or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." Subcomm. Print, 76th Cong., 1st Sess. § 309 (April 22, 1939).

confirms that Congress intended the ICC's labor protection authority to be the exclusive source of protections in ICC-regulated transactions.

More recently, rail labor has repeatedly asked Congress to amend Chapter 109 of the ICA, which includes Section 10901, to mandate labor protections in all line sales and to specify that labor's rights and agreements under the RLA were not superseded by ICC approvals of such line sales.<sup>25</sup> While fully aware of *Ex Parte 392*, the ICC's policy not to impose labor protection on sales of marginal lines, and labor's displeasure with that policy, Congress has declined to enact such legislation.<sup>26</sup> Thus, Congress has not been

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<sup>25</sup> In 1979, RLEA proposed a new ICA Section 10910, which would have required that "[n]o transaction shall be approved under Subchapter I of Chapter 109 of this title involving a carrier or carriers by railroad . . . unless employee protective arrangements shall have been certified by the Commission as fair and equitable in the circumstances of each transaction." *Railroad Transportation Policy Act of 1979: Hearings on S. 1946 before the Senate Comm. on Commerce, Science and Transp.*, 96th Cong., 1st Sess. 536, 544 (1979) (testimony of J.R. Snyder, Chairman, Legis. Comm., RLEA). Subsequently, in 1986, during consideration of the Conrail Privatization Act, Pub. L. No. 99-509, § 4001, *et seq.* (1986), rail labor was again unsuccessful in persuading Congress to require labor protections in Section 10901 transactions. H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 250 (1986). More recently, rail labor sponsored several bills that would amend the ICA to require labor protective conditions in all line sales. *See, e.g.*, H.R. 3332, 100th Cong., 1st Sess. (1987). H.R. 3332 also could have provided that the ICA does not preempt any rights under the RLA.

<sup>26</sup> *Rapid Growth of Short-Line and Regional Railroads: Hearing Before the Subcomm. on Transp., Tourism and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1987) (testimony of R. Kilroy, Chairman, RLEA); *Short Line and Regional Railroads: Hearing Before the Subcomm. on Surface Transp. of the*

inactive in addressing the effects on employees of ICC-approved transactions. Congress has given such effects detailed consideration in the ICA.<sup>27</sup>

## 2. The ICC Has Expertise In Resolving Labor Protection Issues

Similarly, the Third Circuit's conclusion that the ICC lacks labor expertise is also incorrect. (App. II at 50a, 53a). Pursuant to its ICA authority, as interpreted by this Court and amended by Congress, the ICC has been fashioning labor protection conditions for more than 50 years. *See, e.g.*,

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*Senate Commerce Comm.*, 99th Cong., 2d Sess. 86 (1986) (testimony of O. Berge, Chairman, RLEA).

<sup>27</sup> Congress deemed some railroad restructurings to be too large or complicated to be resolved through the usual ICC procedures and enacted special legislation to facilitate these restructurings. These enactments include the Rail Passenger Service Act, 45 U.S.C. § 501, *et seq.*, which created Amtrak to take over intercity passenger operations from railroads desiring to exit the passenger business; the Milwaukee Road Restructuring Act, 45 U.S.C. § 901, *et seq.*, which was enacted to facilitate the restructuring of the Milwaukee Road, then in bankruptcy; the Rock Island Employee Assistance and Training Act, 45 U.S.C. § 1001, *et seq.*, which was primarily designed to address the effects on Rock Island Railroad employees from its liquidation; the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701, *et seq.*, which created Conrail to take over the operations of bankrupt railroads in the Northeast. All of these restructurings had significant impacts on labor. Rail labor testified before Congress on all of this legislation. In all of these enactments, Congress established the applicable labor protections or procedures for agreement on protective conditions addressing the effects on employees. 45 U.S.C. §§ 565, 797, 908 & 1005. In no case was there any indication rail labor could ignore these statutes' treatment of labor protection issues and assert rights under the RLA for different protective benefits or otherwise to block transactions even though none contained an express preemption of the RLA or NLGA.

*United States v. Lowden*, 308 U.S. 225, 235 & n.5 (1939). In reviewing its labor protection authority, the ICC observed that "[f]or more than fifty years the Commission has exercised its authority in this field, frequently at the request of and with the support of labor, and our decisions have had enormous impact on the shape of rail labor relations throughout this period." *FRVR Corp.-Exemption Acquisition and Operation, Certain Lines of Chicago & North Western Transp. Co.*, ICC Finance Docket No. 31205 (decided Jan. 28, 1988) ("FRVR") (App. II at 121a). Rail labor, including RLEA, has actively participated in ICC proceedings on labor protection issues.<sup>28</sup>

### 3. Rail Labor Has Historically Looked To The ICC To Address The Effects Of ICC-Regulated Transactions

The conclusion that Congress intended that labor protection issues be resolved solely by the ICC, pursuant to the ICA, is also confirmed by the past behavior of labor and management. In *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1961), this Court found it significant that an interpretation of the ICC's labor protection authority had been "acquiesced in by all interested parties for 20 years . . . ." *Id.* at 179. For the past 50 years

<sup>28</sup> For example, RLEA and its union members actively participated in the proceedings where the ICC has formulated the standard labor protective condition currently imposed in mergers, *New York Dock Ry. -- Control-Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60 (1979), *aff'd*, *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979); abandonments, *Oregon Short Line R.R.-Abandonment - Goshen*, 360 I.C.C. 91 (1979); and trackage rights and leases, *Mendocino Coast Ry.-Lease and Operate California Western R.R.*, 360 I.C.C. 653 (1980).

rail labor and management have looked exclusively to the ICC for labor protections to address the effects on employees of ICC-regulated transactions. Even when dissatisfied with the ICC's labor protection decisions, rail labor has not, until now, asserted the ability to use its strike weapon. Instead, it has petitioned the courts or Congress for greater protections under the ICA.<sup>29</sup> If, as the Third Circuit concluded, Congress intended the RLA as the mechanism to protect labor's interest, in each of these cases the unions could have simply obtained a status quo injunction or struck when dissatisfied with the ICC's labor protection decision.

Thus, the historical treatment of the effects on employees from ICC-regulated transactions by Congress, the ICC, labor, and management demonstrates that all understood

<sup>29</sup> See, e.g., *BMW v. United States*, 366 U.S. 169 (1961) (union argument for job freeze for four years rejected); *RLEA v. United States*, 339 U.S. 142 (1950) (unions contest ICC limitation on length of protective period); *ICC v. RLEA*, 315 U.S. 373 (1942) (unions contest ICC refusal to impose any labor protections on abandonment); *RLEA v. United States*, 697 F.2d 285 (10th Cir. 1983) (unions contest ICC refusal to impose protections on buyer of rail line); *Knox and Kane R.R. - Gettysburg R.R. - Petition for Exemption*, 366 I.C.C. 439 (1982) (unions protest ICC decision not to impose any protections on buyer or seller of rail line); *Prairie Trunk Ry. - Acquisition and Operation*, 348 I.C.C. 832, 838, 852 (1977), *aff'd*, *Illinois v. United States*, 604 F.2d 519 (7th Cir. 1979) (ICC refuses to require acquirer of rail line to succeed to selling carrier's labor agreements and representation); *Railroads - 1975, Hearings on Legislation Relating to Rail Passenger Service Before the Subcomm. on Surface Transp. of the Senate Commerce Comm.*, 94th Cong., 1st Sess. 1105 (1975) (testimony of W.G. Mahoney, Counsel, RLEA). Even when expressing its dissatisfaction, RLEA did not suggest it could remedy any perceived shortcomings in the ICC's treatment of labor protection simply by asserting allegedly independent effects bargaining rights under the RLA. Rail labor clearly understood it was limited to the ICA for protections and pressed Congress to amend the ICA.

and intended that such effects would be addressed, not through RLA procedures, but solely through the ICC's labor protection authority.

**C. The Third Circuit Failed To Give Any Effect To The ICA Or The ICC's Jurisdiction**

The Third Circuit's failure to accommodate the RLA to the ICA completely frustrated Congress' express statutory language and policies embodied in the ICA in at least four separate ways. First, the Third Circuit has compromised the ICC as the exclusive arbiter of the national railroad transportation policy. Under the ICA, the ICC must weigh competing interests, including labor, and determine whether a transaction is in the overall public interest. 49 U.S.C. § 10101a. See, e.g., *Lowden*, 308 U.S. at 237 (upholding broad conditioning authority to assure transaction is in public interest). Now, however, rail labor can subordinate the public interest to its own and substitute its judgment for the ICC's by utilizing its new-found leverage under the RLA to block ICC-approved transactions of which labor disapproves, unless the transaction is on terms and conditions satisfactory to labor, even if found contrary to transportation policy by the ICC.

Second, *Ex Parte* 392 has been effectively repealed, even though it was affirmed on judicial review, and even though the Third Circuit agreed that it was in fulfillment of congressional intent in the Staggers Act and that the sale of P&LE's lines was the kind of sale intended to be covered by *Ex Parte* 392. The ICC's conclusion that labor protection costs will discourage sales of marginal lines and encourage abandonments, thereby causing a permanent loss of rail

service and jobs, was reasonable and precisely the kind of judgment which Congress left to the ICC's discretion. Rail labor, however, disagrees with the policy decision made in *Ex Parte* 392 and can now block such sales by striking or obtaining a RLA injunction.

Third, Congress' treatment of labor protection in the ICA has been rendered a nullity. Nothing in the legislative history of the ICA suggests that Congress intended the labor protections imposed by the ICC to be binding only on carriers and to be merely a floor above which unions were free to negotiate a better arrangement under the RLA. As the Eighth Circuit held in *Missouri Pacific R.R. Co. v. UTU*, 782 F.2d 107, 112 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987), "it is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired." That is precisely what happened here. Although RLEA had ample opportunity to request the ICC to impose discretionary labor protections on the sale, and has so requested in other exempted sales,<sup>30</sup> it elected not to do so here.

Finally, the Third Circuit's decisions are totally at odds with the structure and intent of the ICA. Congress gave the ICC exclusive jurisdiction over entry into and exit from the railroad business. Congress also went to great lengths, in the 4R and Staggers Acts, to expedite the regulatory process P&LE or other carriers must undergo before they can cease being a carrier. Congress factored in labor's interest by

<sup>30</sup> See, e.g., *PLEA v. United States*, 811 F.2d 1327 (9th Cir. 1987).

amending the ICA's labor protection provisions. Now, on top of this process, the Third Circuit has made P&LE's decision to go out of business subject to yet another regulatory process, the RLA. Application of the "purposefully long and drawn out" procedures of the RLA completely cancels Congress' very specific amendment of the ICA to expedite entry into and exit from the railroad business. Moreover, the decision of when P&LE ultimately can cease operations has been taken out of the ICC's heretofore exclusive jurisdiction, and placed with another federal agency, the NMB. The NMB, not the ICC, will effectively determine when P&LE can exit the railroad business by deciding when to release P&LE and its unions from mediation, and thereby start the 30-day cooling off period before parties can use self-help. *See, e.g., IAM v. NMB*, 425 F.2d 527, 533 (D.C. Cir. 1970). Yet, the NMB has no expertise in transportation matters generally and no obligation to consider the same range of interests.

**D. Limiting Rail Labor To Labor Protections Required By The ICC Does Not Repeal The RLA by Implication**

The Third Circuit believed that any accommodation of the ICA, RLA, and NLGA which would deprive labor of its strike weapon would repeal by implication the plain language of the RLA. (App. II at 6a, 44a-45a) Relying on this Court's holding in *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981), the Third Circuit held that such repeals are disfavored. (App. II at 45a) However, as this Court explained in *United States v. Fausto*, 108 S. Ct. 668, 676 (1988), this principle of statutory construction applies only to repeal by implication of express statutory text. The Court

differentiated such repeal from "repeal by implication of a legal disposition implied by a statutory text . . . ." *Id.* at 676. Judicial interpretation of a statute's implication can be repealed by the implications of a later statute. That is the case here.

Nothing in the RLA, either in its express terms or legislative history, states that a carrier must bargain over the effects of its decision to go out of business as a carrier or, if there were such an obligation, that such effects bargaining must be exhausted before the sale of its rail lines is consummated. The Third Circuit's conclusion that the RLA is designed to delay certain management decisions, in order to give rail labor leverage (App. II at 40a), is nothing more than an implication divined from the RLA by the Third Circuit, and an incorrect one at that, as explained in Part I. A carrier's decision whether to be in business at all is not a mandatory subject of bargaining and therefore the RLA was not intended to give labor leverage over that decision.

For railroad managements, such a decision is made subject to the ICC's jurisdiction, not by implication, but by the express statutory text of the ICA. 49 U.S.C. §§ 10901(a), 10903(a). While the RLA is silent on effects bargaining, Congress has given detailed attention to the effects of ICC-regulated transactions in the ICA. *See, e.g.,* 49 U.S.C. §§ 10901(e), 10903(b)(2), 10910(e) & (j). Thus, the conclusion that Congress intended that effects be addressed solely by the ICC does not repeal the RLA by implication. However, even if the implications of the RLA found by the Third Circuit ever had any validity, they were dispelled and "altered by the implications of later statutes," the 4R and

Staggers Acts, and their comprehensive treatment of labor protection issues. *Fausto*, 108 S. Ct. at 676.

The accommodation of the RLA to the ICA, where the ICC has jurisdiction to impose labor protective conditions, gives effect to the policies of both statutes. Rail labor can still utilize the RLA to bargain the effects of management decisions not subject to the ICC's jurisdiction. The Third Circuit's "accommodation," however, gave absolutely no effect to the congressional purpose of the ICA and therefore was contrary to the requirement of this Court that effect be given to all statutes. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

**E. All Judicial Decisions Prior To *P&LE II* Recognized That The ICC Has Exclusive Jurisdiction To Address The Effects Of ICC-Approved Transactions**

Until *P&LE II*, every court to consider whether the ICC's authority to impose labor protection supersedes inconsistent requirements of the RLA concluded that it must.<sup>31</sup> In *ICC v. Brotherhood of Locomotive Engineers*, 107 S. Ct. 2360 (1987), at least four Justices were prepared to hold that the ICC's jurisdiction supersedes any inconsistent RLA requirements. *Id.* at 2376-78 (Stevens, J., concurring).

<sup>31</sup> *See, e.g., Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 804 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *Missouri Pacific R. Co. v. UTU*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987); *Burlington Northern Inc. v. American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

The Third Circuit distinguished this precedent on the basis that it involved ICA Section 11341(a), which expressly exempts merger transactions from "all other law," and because ICC labor protections were actually imposed in those cases. (App. I at A-12, A-13 n. 8)

An express preemption is unnecessary because, as previously explained, nothing in the statutory language of the RLA mandates effects bargaining before a railroad exits the railroad business. Moreover, the ICC's jurisdiction over sales and abandonments is as plenary as its jurisdiction over mergers, even though the ICA provisions governing the former do not contain an express preemption. There is certainly no basis for concluding that Congress intended the ICC to be able to consider and reconcile competing interests in railroad consolidations subject to ICA Chapter 113, but not in sales or abandonments of rail lines subject to ICA Chapter 109. The Eighth Circuit recognized the artificial nature of this distinction in *Burlington Northern R.R. v. UTU*, 848 F.2d 856 (8th Cir. 1988), where it held the ICC's jurisdiction under Section 10901 preempted the RLA. Similarly, it makes no sense that Congress intended that labor could disrupt the sale of a rail line to a non-carrier, a Section 10901 transaction, but not the sale to an existing carrier, a Section 11341(a) transaction. Furthermore, such a distinction would allow labor to strike over Section 10903 abandonments, even though labor protection is mandated in abandonment of anything less than an entire system. 49 U.S.C. § 10903(b)(2). Moreover, if Section 10901 could not have preemptive effect unless it contained express language as found in Section 11341(a), which also references "State and municipal law," it could not even preempt inconsistent state law. That is clearly

not the case. See *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Corp.*, 450 U.S. 311 (1981); *Transit Commission v. United States*, 289 U.S. 121, 127 (1933). Finally, this Court has had no trouble accommodating the NLGA to the RLA, even though the RLA contains no express preemption of NLGA. See, e.g., *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957).<sup>32</sup>

Whether the ICC imposes protections in any particular case also does not affect the exclusivity of its jurisdiction. As the ICC observed in *FRVR*, its "[j]urisdiction is not determined by outcome." (App. II at 122a) If the ICC's jurisdiction to address effects issues was exclusive only if the ICC actually imposed protections, then the ICC effectively would be deprived of its discretion to impose such protections in Section 10901 transactions, even though Congress has not chosen to limit that discretion.

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<sup>32</sup> An express preemption was also not necessary to find that the Civil Aeronautic Board's ("CAB") analogous discretionary labor protection authority under the Federal Aviation Act preempted inconsistent RLA requirements. See, e.g., *IAM v. Northeast Airlines, Inc.*, 473 F.2d 549, 559-60 (1st Cir.), cert. denied, 409 U.S. 845 (1972) ("One of the policies behind this grant of [labor protective] authority to the CAB is to prevent mergers . . . in the public interest from being obstructed by labor disputes"); see also *Kesinger v. Universal Air Lines Inc.*, 474 F.2d 1127, 1131-32 (6th Cir. 1973); *Kent v. CAB*, 204 F.2d 263, 265-66 (2d Cir.), cert. denied, 346 U.S. 826 (1953); *Hyland v. United Airlines, Inc.*, 254 F. Supp. 367, 372 (N.D. Ill. 1966).

### III. The RLA Injunction Was A Collateral Attack Upon The ICC's Orders Authorizing The Immediate Sale Of P&LE's Lines

The status quo injunction was also an impermissible collateral attack upon the ICC's orders finding that the immediate sale of P&LE's rail lines to Railco was in the public interest, because the necessary effect of the injunction was to vacate those orders.

Under the Hobbs Act, only the Courts of Appeals have jurisdiction to "enjoin, set aside, suspend . . . or to determine the validity of" ICC orders. 28 U.S.C. § 2342(5); see also *id.* § 2321. In *P&LE II*, the Third Circuit found no collateral attack, because it concluded the ICC's orders approving the sale were merely "permissive." (App. II at 37a) No distinction between "mandatory" and "permissive" orders is recognized in the Hobbs Act, which makes all ICC orders reviewable only as provided in Title 28. Indeed, the Third Circuit's attempted distinction would vitiate the Hobbs Act's requirements, because many orders of the ICC, as well as of other agencies whose orders are subject to review under the Hobbs Act, permit rather than require action. This Court rejected such a distinction in *Venner v. Michigan Central R.R.*, 271 U.S. 127 (1926), where it stated: "[t]hat the [ICC] order is not mandatory but permissive makes no difference in this regard." *Id.* at 131. What this Court found significant was that the effect of the requested injunction was to enjoin the railroads "from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside." *Id.* at 130. Here, the status quo injunction prevented P&LE from doing what *Ex Parte* 392 and the ICC's September 25, 1987 order refusing to stay

the sale specifically authorized -- sale of its rail lines to Railco after seven days' notice. Thus, the District Court's status quo injunction effectively "adjudged invalid and set aside" those orders, contrary to the jurisdictional requirements of the Hobbs Act.

The Third Circuit attempted to distinguish *Venner* on the basis that the injunction merely "delayed" implementation of the ICC-approved sale, while the injunction requested in *Venner* "truly would have blocked the approved transaction . . . ." (App. II at 38a-39a, n.27). The injunction, however, not only delayed the sale, it killed it. Moreover, the indefinite delay of the sale had the impermissible effect of modifying the ICC's orders. The Third Circuit's characterization of *Venner* as simply a federal preemption case also was invalid. The Supreme Court's decision was founded solely on the impact of the relief requested on the ICC's order.

The Third Circuit stated that it would have reached a different result if the injunction had "overturn[ed] an administrative determination that a delay or collapse of the sale and the imposition of labor protection would harm the public interest." (App. II at 38a) That was precisely what the ICC found, concluding that "[t]he public interest does not support a grant of a stay. Rather, it is in the public interest to allow the class exemption to take effect, and to address the issues raised by Petitioners via the revocation process." (App. II at 103a) The ICC also explicitly found in *Ex Parte* 392 that the imposition of labor protection was not in the public interest, because the costs of such protection could discourage the sale. 1 I.C.C.2d at 815.

The Third Circuit also concluded that "[t]he mere fact that a government agency has refused to impose an economic solution on a private labor dispute does not imply that the agency has refused to allow the parties themselves to bargain for and reach an agreement" and that the ICC merely determined that consummation of the sale without labor protection would not be "extraordinarily unfair." (App. II at 41a-42a) However, because the ICC had exclusive jurisdiction to approve all terms and conditions of the sale, the parties' disagreement over the extent of labor protections to be required as a condition of the sale was not a private labor dispute. Moreover, the ICC did not merely refuse to impose labor protections; it affirmatively found in *Ex Parte* 392 that the imposition of labor protections on the sale of marginal lines was not in the public interest. Thus, the status quo injunction effectively vacated and reversed the ICC's order in *Ex Parte* 392 to the extent it applied to this sale, and the ICC's September 25, 1987 Order, because both concluded that expeditious sale without labor protection was in the public interest.

Courts have consistently refused to allow unions to avoid Hobbs Act review of ICC orders by asserting conflicting rights under the RLA, even when those orders are "permissive." See, e.g., *UTU v. Norfolk & Western Ry.*, 822 F.2d 1114, 1120 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 700 (1988) (a union "merely by drafting an artfully worded [RLA] complaint, [cannot] avoid the bar of a clearly applicable jurisdictional statute."); *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986) (dismissing request for RLA status quo injunction as "in essence, a

collateral attack upon the ICC's order."'). This is also true for line sales. See *RLEA v. Chicago & North Western Transp. Co.*, 129 L.R.R.M. (BNA) 3054 (8th Cir. 1988), *pet. for cert. pending*, 57 U.S.L.W. 5376 (U.S. Nov. 29, 1988) (No. 87-2049); *RLEA v. Staten Island R.R.*, 792 F.2d 7, 12 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 927 (1987) ("Under no circumstances could [RLEA's] request be granted without rescission or modification of the ICC's order."); *accord, Oling v. ALPA*, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965).<sup>33</sup>

*P&LE II* must be reversed or else rail labor can avoid the ICC's jurisdiction and congressionally mandated procedure for review of ICC orders simply by filing a RLA complaint and seeking to enjoin the ICC-approved transaction in District Court.

#### IV. The NLGA Did Not Bar A Strike Injunction

The District Court premised its strike injunction entirely upon the ICA. In *P&LE I*, the Third Circuit vacated that injunction on the basis that the NLGA, 29 U.S.C. § 101, *et seq.*, is not accommodated to the ICA. The Third Circuit concluded that accommodation of the NLGA was required only if there was an irreconcilable conflict with another statute and the other statute was enacted as part of a pattern of federal labor legislation. (App. I at A-6) The Third Circuit's conclusion that the ICA could not in any aspect be considered labor legislation, which was central to its rulings

<sup>33</sup> The contrary appellate court decisions are *P&LE II* and *RLEA v. City of Galveston*, 849 F.2d 145 (5th Cir. 1988), *pet. for cert. pending*, 57 U.S.L.W. 3262 (U.S. Sept. 26, 1988)(No. 88-517), which simply follows *P&LE II*.

in *P&LE I* and *II*, was erroneous. Additionally, the District Court independently had jurisdiction to enjoin the strike as violative of the RLA.

#### A. The NLGA Must Be Accommodated To The ICA Because The ICA's Labor Protection Authority Is A Labor Statute

This Court's leading case involving the accommodation of other statutes to the NLGA is *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957), which held that the NLGA did not bar an injunction of a strike over a minor dispute within the meaning of the RLA. This Court reasoned that, because Congress provided in the RLA that minor disputes be resolved through binding arbitration, it could not have intended that the parties be able to utilize self-help to resolve such disputes. After weighing the policies of the NLGA against judicial intervention in labor disputes versus the policies of the RLA for arbitration of minor disputes, this Court reasoned as follows:

[T]he [RLA] channeled these economic forces, in matters dealing with railway labor, into special processes intended to compromise them. Such controversies, therefore, are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative.

*Id.* at 41. See also *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515 (1937) (injunctive relief available to enforce RLA's representation dispute procedures). This same balancing analysis requires that Congress' treatment of labor protection in the ICA be considered part of the pattern of

legislation dealing with railway labor matters. Clearly, the interest of labor is at the heart of the ICC's labor protection conditioning authority, as this Court recognized in *Lowden* and *ICC v. RLEA*. Similarly, labor has been active before Congress in shaping the ICC's labor protection authority. By dealing with labor protection issues in the ICA, Congress has "channeled" them "into special processes intended to compromise them . . . ." Those special processes are the detailed processes of the ICC, including the right of judicial review. Just as Congress placed minor and representation disputes into the exclusive jurisdiction of, respectively, arbitrators and the NMB, disputes over labor protection in ICC-regulated transactions have been channeled into the exclusive jurisdiction of the ICC.

Congress determines whether a statutory minimum level of protections is to be required, as in the case of mergers. If labor protection is mandated, the ICC determines what level satisfies the statute, and whether, in the exercise of its discretion, protections should be required beyond the statutorily required minimum. In other cases, such as line sales to non-carriers, Congress has left complete discretion to the ICC to determine what level of protections, if any, should be required. In either case, rail labor has the full right and opportunity to participate in the ICC proceedings to determine the level of protections to be required. Here, labor had the ability to raise labor protection issues through a petition to revoke as provided for in *Ex Parte* 392, 1 I.C.C.2d at 812; 49 C.F.R. § 1150.34. If dissatisfied with the ICC's decision, rail labor can seek reconsideration from the ICC or seek judicial review in the Court of Appeals pursuant to the Hobbs Act.

In those circumstances when the ICC imposes labor protective conditions, rather than resolve disputes growing out of those conditions in the first instance itself, the conditions provide for arbitration. See, e.g., *New York Dock Ry. - Control - Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, 84, 87-88 (1979). The arbitrator's decision is an order of the ICC, and labor has the right to seek its review by the ICC. See, e.g., *IBEW v. ICC*, No. 87-1629 (D.C. Cir. Nov. 25, 1988). If rail labor is dissatisfied with the ICC's review of the award, it can appeal that ICC decision. See, e.g., *UTU v. Norfolk & Western Ry. Co.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 700 (1988). Thus, Congress has provided in the ICA a comprehensive scheme for the resolution of labor protection issues arising out of ICC-regulated transactions.

The Eighth Circuit properly accommodated the NLGA to the ICA in *Missouri Pacific R.R. v. UTU*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987) ("*Mopac*"). The Eighth Circuit adopted the reasoning of the District Court, which analogized the ICC's labor protection authority to labor legislation and therefore found accommodation consistent with *Chicago River*, 353 U.S. at 30. See, e.g., 580 F. Supp. 1490, 1506 (E.D. Mo. 1984). In *Burlington Northern v. UTU*, 848 F.2d at 856, the Eighth Circuit concluded that the ICC's jurisdiction over Section 10901 was not accommodated to the NLGA, because there was no express preemption of other laws in Section 10901.<sup>34</sup>

<sup>34</sup> The Eighth Circuit also concluded there was no accommodation unless the ICA-mandated labor protection. 848 F.2d at 863. Such a requirement robs the ICC of discretion to require labor protections when Congress left its conditioning authority discretionary.

as there was in the ICA's merger provisions at issue in *Mopac*. However, this Court's accommodation analysis has never required that there be an express preemption. No such express preemption was necessary to accommodate the NLGA to the RLA. Likewise, in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 396 U.S. 235 (1970), the NLGA was held not to bar injunction of a strike in violation of a no-strike clause in a collective bargaining agreement subject to the NLRA, even though the NLRA did not expressly preempt the NLGA. This Court recognized that, as Congress legislated on labor matters "without extensive revision of many of the other enactments, including the anti-injunction section of the Norris-LaGuardia Act. . . . it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones." *Id.* at 251. Similarly, the Third Circuit should have reconciled the NLGA to ICA Section 10901, even though Congress did not there include an express preemption of the NLGA, because Congress channeled all disputes over the effects of Section 10901 sales to the ICC. —

Clearly, the principal reason the Third Circuit refused to accommodate the NLGA to the ICA was the Third Circuit's belief that the ICC's labor protection authority was not a reasonable alternative to labor's strike weapon. In order for a substitute to be meaningful, the Third Circuit believed it had to allow for the possibility of either negotiation or economic self-help. (App. I at A-6, A-7) This belief is irreconcilable with *Chicago River* and *Boys Markets*, where this Court found arbitration was a reasonable substitute even though arbitration did not allow for negotiation or self-help. *Accord, Brotherhood of Locomotive Engineers v. Louisville*

*Nashville R.R.*, 373 U.S. 33, 40 (1962) (union cannot strike to enforce arbitration award).

The Third Circuit justified its preservation of labor's strike weapon by its conclusion that labor had only a "small voice of protest" at the ICC, because labor protections are purely discretionary in Section 10901 sales and because, in *Ex Parte 392*, the ICC placed the burden of persuasion for labor protections on rail labor. (App. II at 42a) However, it was not for the Third Circuit to substitute its judgment for that of Congress that the ICC was a satisfactory forum to resolve labor protection matters or that after-the-fact remedies were adequate under 49 U.S.C. § 10505(d). *See, e.g., H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980)*. Nor was the Third Circuit to second-guess the ICC's judgment that labor protections should not automatically be required in sales of marginal lines.

The conclusion that labor has a small voice of protest at the ICC greatly misjudges labor's historic involvement in shaping the ICC's labor protection authorities, both in Congress and at the ICC, and the right to judicial review. In any event, the ICC must consider the impacts on labor from the sale of a rail line, whether the ICC's labor protection authority is completely discretionary, as in a Section 10901 transaction, or whether the ICC approves a sale by way of its exemption authority under Section 10505, as in the sale of P&LE's lines to Railco. In all cases, the ICC must justify its labor protection decisions. *See, e.g., RLEA v. United States*, 811 F.2d 1327, 1329-30 (9th Cir. 1987); *RLEA v. ICC*, 784 F.2d 959, 972 (9th Cir. 1986) (ICC is required to present a "carefully articulated, reasoned balancing of factors pertinent to the particular acquisition . . ."). Moreover, RLEA here

did not even avail itself of the opportunity provided by Congress and the ICC to request labor protections; RLEA deliberately chose not to request such protections, although it sought other relief in its petition to revoke Railco's exemption.

This Court's decision in *Telegraphers* does not support the Third Circuit's refusal to accommodate the NLGA to the ICA. Contrary to *P&LE I*'s erroneous conclusion, P&LE's arguments were not "comparable to those . . . rejected by the Supreme Court in [*Telegraphers*]." (App. I at A-9) *Telegraphers* did not involve any transaction subject to the jurisdiction of the ICC or any orders of the ICC. Unlike the ICC, the state agencies in that case did not have ICA authority to impose labor protection as a condition of permitting the closure of stations. In that regard, the Third Circuit's reliance on the fact that, at the time of *Telegraphers*, Congress required the ICC to impose labor protections in mergers was similarly completely misplaced, because *Telegraphers* did not involve an ICC-regulated transaction.

The Fifth Circuit's decision in *Texas & New Orleans R.R. v. Brotherhood of R.R. Trainmen*, 307 F.2d 151 (5th Cir. 1962), cert. denied, 371 U.S. 952 (1963), also provides no support for *P&LE I*. In *Texas & New Orleans*, the Fifth Circuit refused to accommodate the NLGA to the ICC's approval, pursuant to Section 5(f) of the ICA (now 49 U.S.C. §§ 11341-47), of a railroad consolidation, even though the ICC had imposed the statutorily required labor protection. *Texas & New Orleans* is factually different from the *P&LE*

cases. In *Texas & New Orleans*, the carriers first tried to change existing labor contracts through the RLA process by serving Section 6 notices and initiating bargaining. After they failed to reach agreement with one union, they included their proposed work rule changes in their application for ICC approval of consolidated operations. Here, P&LE was not seeking to change any of its existing agreements, because those agreements did not require it to stay in business. The ICC's orders authorizing the sale of P&LE's lines did not alter P&LE's existing agreements in any way. In any event, *Texas & New Orleans*' failure to accommodate NLGA to the ICA suffers from all the same defects as *P&LE I*.<sup>35</sup>

Significantly, the *Texas & New Orleans* opinion has not been followed by any other Circuit. The ICC and every court since *Texas & New Orleans* have concluded that the ICC's jurisdiction over mergers and consolidations preempts inconsistent requirements of the RLA and the NLGA. See, e.g., *Burlington Northern R.R. v. UTU*, 848 F.2d 856 (8th

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<sup>35</sup> The Fifth Circuit also misread the proviso to Section 5(2)(f), which allows the parties to negotiate a labor protective arrangement different from that which the ICC would impose. 307 F.2d at 160. Such a negotiated protective arrangement becomes part of the ICC's order approving the merger. See, e.g., *Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37, 43 (1971). This proviso merely allows, but does not require, carriers and unions to agree on the labor protective arrangement which satisfied the ICA, rather than have the ICC fashion the labor protections. The ICC must still independently satisfy itself that the agreed-to protective arrangement satisfied the ICA. *Id.* at 43. If the parties do not agree upon a protective arrangement, that disagreement does not allow the unions to strike. They then petition the ICC to use its discretionary authority to require more than the statutory minimum. In the case of consolidations, the ICC's recent consistent practice has been to impose its *New York Dock* conditions. See, e.g., *CSX Corp-Control-Chessie System, Inc. and Seaboard Coast Line Industries Inc.*, 363 I.C.C. 521, 588 (1980).

Cir. 1988); *Brotherhood of Locomotive Engineers v. Boston and Maine Corp.*, 788 F.2d 794, 804 (1st Cir.), cert. denied, 479 U.S. 829 (1986); *Missouri Pacific R.R. v. UTU*, 782 F.2d at 107; *Burlington Northern Inc. v. American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975).

Finally, even the *Texas & New Orleans* court would accommodate the NLGA to the ICC's jurisdiction when, after unions had had a chance to express their views, the ICC determined the unions' demands were contrary to the public interest. 307 F.2d at 161-62. That was the case here. RLEA had a chance to present its labor protection views in the *Ex Parte* 392 rulemaking and in its petition to revoke the exemptions granted to P&LE's purchaser. The ICC found in *Ex Parte* 392 that such conditions were contrary to the public interest in sales of marginal lines.

Thus, under a proper application of this Court's accommodation cases, and to make sense of the ICC's jurisdiction to approve sales of rail lines and resolve labor protection disputes, the NLGA must be accommodated to the ICA.

#### **B. The Strike Was Separately Enjoinable As A Violation Of The RLA**

Under this Court's longstanding precedent, the NLGA is accommodated to the RLA to allow injunction of RLA violations. See, e.g., *Chicago & North Western Ry. v. UTU*, 402 U.S. 570, 582 (1971); *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957); *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515 (1937).

The strike violated the the RLA in two different ways. First, as explained in Part I, *supra*, P&LE was under no mandatory duty to bargain over the unions' Section 6 notices, because they sought to bargain over P&LE's decision to go out of business. Alternatively, any RLA duty to bargain over the sale was superseded by the ICC's jurisdiction. In each case, neither decision nor effects bargaining was mandatory. A union, or carrier, which seeks to bargain to impasse or threatens to strike over a non-mandatory subject violates the duty to bargain in good faith and make and maintain agreements contained in Section 2, First of the RLA. 45 U.S.C. § 152, First. See, e.g., *Chicago & North Western Ry. v. UTU*, 402 U.S. at 574; *Japan Air Lines Co. v. IAM*, 538 F.2d at 52. Upon learning of P&LE's decision to go out of business, P&LE's unions were no more free to strike than P&LE would have been unilaterally to reduce wages under its agreements.

Second, even if this Court were to conclude that P&LE had a mandatory duty to bargain over the effects of the sale which was not superseded by the ICC's jurisdiction, its unions had not exhausted the RLA's major dispute procedures governing bargaining over their Section 6 effects notices. P&LE's unions were free to strike only after having exhausted the RLA's major dispute procedures. Their strike prior to the exhaustion of those procedures violated the RLA. See, e.g., *Local 553, TWU v. Eastern Air Lines, Inc.*, 695 F.2d 668, 674 (2d Cir. 1982). The implementation of the sale while effects bargaining went forward would not violate the RLA, because, as previously explained, the sale of P&LE's rail lines did not change working conditions or the status quo within the meaning of the RLA.

Thus, under a proper accommodation of the NLGA, ICA, and RLA, which gives effect to all three statutes, the strike by P&LE's unions to block the sale was enjoined either as a violation of the ICA or the RLA or both.

#### V. The Order Constitutes An Impermissible Taking Of P&LE's Property In Violation Of The Fifth Amendment

As applied in this case, the RLA caused an impermissible taking of P&LE's property in violation of the Fifth Amendment to the United States Constitution. Property ownership carries with it a "bundle of rights," including the "right to possess, use[,] and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945). The Fifth Amendment prohibits the federal government from taking private property for a public purpose without just compensation. While the "classical" taking occurs when the government either acquires title to or physically occupies private property, a "takings analysis is not necessarily limited to outright acquisitions by the government for itself." *United States v. Security Industrial Bank*, 459 U.S. 70, 78 (1982). Government action in the form of regulation can also constitute a taking that requires just compensation.<sup>36</sup> See

36 "Government regulation ... involves the adjustment of rights for the public good," *Andrus v. Allard*, 444 U.S. 51, 65 (1979); thus, property owners must tolerate some restrictions on property use. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-92 (1987). However, "if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). See *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3148 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164

*Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3146-50 (1987); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). Regulations and statutes that have the effect of taking private property are also subjected to takings analysis even though they were not enacted with such an intention. See *United States v. Security Industrial Bank*, 459 U.S. at 78-82; *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

By requiring P&LE to secure a prospective purchaser's contractual commitment to assume P&LE's labor contracts, employee complement, and RLA obligations if P&LE sold its assets prior to either securing new agreements or exhausting the RLA process, the order entered by the District Court below created a new condition on any sale agreement that P&LE enters with a prospective purchaser. The court's imposition of a "successorship" requirement changed the nature of the original transaction and caused its cancellation. Since that time, no purchaser has been willing to agree to the requirements imposed by the court order. Thus, the "successorship" clause, which the court believed the RLA required, impermissibly interfered with P&LE's right to dispose of its property. See *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 15 (1984). P&LE has lost over \$60 million since 1982 and the interest on its debt is accruing at a rate of about \$800,000 per month. While RLA bargaining continues, P&LE's assets erode and its debt

(1978); see also *Railroad Commission of Texas v. Eastern Texas R.R.*, 264 U.S. 79, 85 (1924); *Bullock v. Railroad Commission of Florida*, 254 U.S. 513, 520 (1921); *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U.S. 396, 399 (1920) (government order compelling private railroad to stay in business at hopeless loss constituted a taking).

increases, which causes a direct loss to the property owners -- P&LE's shareholders and creditors.<sup>37</sup>

The final option suggested by the District Court was that P&LE reach an agreement with its unions over the "effects" of the sale, thereby freeing itself to move forward. As P&LE has demonstrated above, the unions recognize full well that their "effects" proposal, if agreed to by P&LE, would simply accomplish by contract that which the court order has temporarily done - it would render P&LE's assets unsellable.

This Court has recognized that there is a point at which the loss to the owner through erosion of assets becomes "unreasonable even in light of the public interest" served by requiring the carrier to remain in business. *Regional Railroad Reorganization Cases*, 419 U.S. 102, 124 (1974). No public interest is served by the ongoing "bargaining" in this case. The protracted and often interminable RLA processes were intended to further agreements between RLA employers and employees. P&LE intends to terminate its status as an RLA employer. Thus, there is no need for the RLA dispute resolution process to be

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<sup>37</sup> After the Railco transaction failed, and during the pendency of the RLEA-CSXT joint venture, there were negotiations to form an employee-owned railroad to be called Newco. After obtaining ICC approval, Newco would operate the property as a new carrier. While this proposal ultimately failed because the unions could not reach agreement, P&LE was compelled to accelerate liquidation of its rail assets in order to lower operating losses and meet its debt obligations. As a consequence of this and other impediments to P&LE exiting from the rail business, P&LE's net equity value decreased by more than 100% during the 1987-1988 fiscal year. See generally Petitioner's Supp. Brief, App. C. (filed Nov. 22, 1988).

utilized in this case, because the parties subjected to bargaining, P&LE and its unions, will no longer have an RLA-controlled relationship. Therefore, the taking of P&LE's property furthers no legitimate purposes for which the RLA was enacted. This Court's established precedent holds that if the state deprives another person of property without a justifying public purpose, it is a taking. See, e.g., *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937).

Furthermore, even if P&LE's property was taken in order to further a legitimate RLA public purpose, this Court's decision in *Eastern Texas* demonstrates that a balance must be struck between the public purpose served and the private property interest affected. 264 U.S. at 85. Moreover, the order should have been narrowly drawn since it is a canon of statutory construction that "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality." *IAM v. Street*, 367 U.S. 740, 749 (1961). This Court's decisions in *Eastern Texas* and *Street* require that a statute which affects constitutional rights must be construed, if possible, so as not to interfere with those rights. Thus, even if a statutory duty to bargain over effects existed, that duty must be narrowly construed and any order enforcing it must be narrowly drawn to protect P&LE's Fifth Amendment rights. The lower courts failed to do so in the instant case.

Interpretation of the RLA to prevent P&LE from going out of business deprived P&LE of its right to dispose of its property and has caused a significant erosion of the value of P&LE's property. In the circumstances of this case, the District Court's order thus constituted an impermissible

taking of P&LE's property prohibited by the Fifth Amendment.

### CONCLUSION

For the reasons set forth herein, the decisions of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

G. Edward Yurcon  
THE PITTSBURGH & LAKE  
ERIE RAILROAD  
COMPANY  
780 Commerce Court  
Four Station Square  
Pittsburgh, Pennsylvania 15219  
(412) 263-3806  
Counsel for Petitioner

Richard L. Wyatt, Jr.\*  
Ronald M. Johnson  
Charles L. Warren  
Eric D. Witkin  
AKIN, GUMP, STRAUSS  
HAUER & FELD  
1333 New Hampshire Ave., N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 887-4000  
Counsel for Petitioner

\* Counsel of Record

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### APPENDIX

**Railway Labor Act, 45 U.S.C. § 151, *et seq.***  
**Section 2, First 45 U.S.C. § 152.**

**§ 152. General Duties**

**First. Duty of carriers and employees to settle disputes**

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

## Section 5, 45 U.S.C. § 155

### § 155. Function of Mediation Board

#### First. Disputes within jurisdiction of Mediation Board

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or any emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

#### Second. Interpretation of agreement

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

#### Third. Duties of Board with respect to arbitration of disputes; arbitrators; acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board; custody of records and documents

The Mediation board shall have the following duties with respect to the arbitration of disputes under section 157 of this title:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 157 of this title, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator made by the Mediation Board, in accordance with the provisions of this chapter, shall be removed by such Board as provided by this chapter, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this chapter for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this chapter. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as

provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or

subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules, or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such

records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession. (May 20, 1926, c. 347, § 5, 44 Stat. 580; June 21, 1934, c. 691, § 5, 48 Stat. 1195; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.)

## Section 6, 45 U.S.C. § 156

## § 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

(May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197.)

## Section 10, 45 U.S.C. § 160

## § 160. Emergency Board

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* that no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no

change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

(May 20, 1926, c. 347, § 10, 44 Stat. 586; June 21, 1934, c. 691, § 7, 48 Stat. 1197.)

**Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.***

**Section 10505, 49 U.S.C. § 10505**

**§ 10505. Authority to exempt rail carrier transportation**

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle--

- (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
- (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation

is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provision of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continued intermodal movement.

(g) The Commission may not exercise its authority under this section

- (1) to authorize intermodal ownership that is otherwise prohibited by this title, or
- (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1361; Pub.L. 96-488, Title II, § 213, Oct. 14, 1980, 94 Stat. 1912.

## Section 10901, 49 U.S.C. § 10901

### § 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may --

- (1) construct an extension to any of its railroad lines;
- (2) construct an additional railroad line;
- (3) acquire or operate an extended or additional railroad line; or
- (4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall --

- (1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

- (2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;
- (3) have a copy of the summary published in the Federal Register;
- (4) take other reasonable and effective steps to publicize the application; and
- (5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

(c)(1) If the Commission --

- (A) finds public convenience and necessity, it may --
  - (i) approve the application as filed; or
  - (ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or
- (B) fails to find public convenience and necessity, it may deny the application.
- (2) On approval, the Commission shall issue to the rail carrier a certificate describing the

construction or acquisition (or both) and operation approved by the Commission.

(d)(1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

- (2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1402; Pub.L. 96-448, Title II, § 221, Oct. 14, 1980, 94 Stat. 1928.

**Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.***

**Section 4, 29 U.S.C. § 104**

**§ 104. Enumeration of specific acts not subject to restraining orders or injunctions**

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

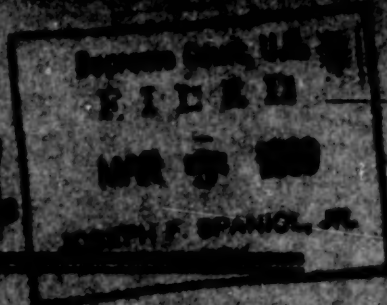
- (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
- (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;
- (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
- (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in,

or is prosecuting, any action or suit in any court of the United States or of any State;

- (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
  - (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
  - (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
  - (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
  - (i) Advising, arguing, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 103 of this title.
- (Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.)

**Amendment V to the United States Constitution.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



IN THE  
**Supreme Court of the United States**  
October Term, 1938

**THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,**  
*Petitioner,*

v.

**RAILWAY LABOR EXECUTIVES' ASSOCIATION, and the  
INTERSTATE COMMERCE COMMISSION,**  
*Respondents.*

On Writs of Certiorari to the United States  
Court of Appeals for the Third Circuit

**BRIEF OF RESPONDENT  
RAILWAY LABOR EXECUTIVES' ASSOCIATION**

**WILLIAM G. MAHONEY  
JOHN O'B. CLARK, JR.\***  
HUGHES & MAHONEY, P.C.  
Suite 210  
1080 - 17th Street, N.W.  
Washington, D.C. 20036  
(202) 295-3500

*Attorneys for Respondent  
Railway Labor Executives'  
Association*

Date: March 3, 1939

\* Counsel of Record

WILLIAM G. MAHONEY, JR., 1080 - 17th Street, N.W., Washington, D.C. 20036

**BEST AVAILABLE COPY**

## QUESTIONS PRESENTED

1. Do Sections 2 First, 2 Seventh and 6 of the Railway Labor Act, 45 U.S.C. §§ 152 First, 152 Seventh and 156, require a railroad to notify its employees of its decision to sell its rail lines for continued rail operations, where that sale would not preserve existing, collectively established, rates of pay, rules and working conditions?

2. Does the Railway Labor Act's status quo obligations prohibit the P&LE, until that carrier has complied fully with Section 6 of the Act, from selling its rail lines in such a way that the existing collective bargaining agreements will be terminated and the employees' existing rates of pay, rules, working conditions and employment relationships will be drastically changed?

3. Does the Interstate Commerce Act supersede the Railway Labor Act and relieve a rail carrier from its notice, bargaining and status quo obligations under the labor statute, where that carrier is participating in a corporate transaction subject to regulation by the Commission?

4. Do the federal courts have jurisdiction to enforce the notice, bargaining and status quo commands of the Railway Labor Act in a case involving a carrier which is participating in a corporate restructuring that the Commission has exempted from regulation under the Interstate Commerce Act?

5. Does the Interstate Commerce Act, and its grant of jurisdiction to the Commission to insure that a carrier participating in a corporate restructuring does not act in a manner contrary to the public interest as set forth in the transportation statute, restore to the federal courts the jurisdiction to enjoin peaceful strikes which Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 has withdrawn?

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

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THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
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v.

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**On Writs of Certiorari to the United States  
Court of Appeals for the Third Circuit**  
\_\_\_\_\_

**BRIEF OF RESPONDENT  
RAILWAY LABOR EXECUTIVES' ASSOCIATION**  
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This brief is respectfully submitted by respondent Railway Labor Executives' Association [hereinafter, "RLEA"]<sup>1</sup> in support of the Third Circuit's decisions and judgments in two separate proceedings involving the Pittsburgh & Lake Erie Railroad Company [hereinafter, "P&LE"].

<sup>1</sup> RLEA is a voluntary, unincorporated association of the chief executive officers of nineteen labor organizations or divisions thereof, which collectively represent virtually all organized rail employees in this country. A list of RLEA's member organizations is attached to this brief as Appendix A; those organizations which represent P&LE employees are marked by an asterisk.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Besides those constitutional and statutory provisions identified by petitioner, respondent RLEA submits that the Commerce Clause of the Constitution of the United States (Art. I, § 8, cl. 3), Section 2 Seventh of the Railway Labor Act (45 U.S.C. § 152 Seventh), Section 11347 of the Interstate Commerce Act (49 U.S.C. § 11347), Sections 2, 8 and 13 of the Norris-LaGuardia Act (29 U.S.C. §§ 102, 108, 113), and Section 20 of the Clayton Anti-Trust Act (29 U.S.C. § 52) are also involved in these consolidated cases. These constitutional and statutory provisions are reproduced as Appendix B to this brief.

## COUNTERSTATEMENT OF THE CASE

Petitioner P&LE is a relatively small rail carrier that was formed in 1875 and by 1987 operated a rail system that owned 182 miles of rail line extending generally from Youngstown, Ohio to Brownsville and Connellsville, Pennsylvania. The P&LE also had trackage rights to operate over another 190 miles of track owned by two other rail systems, extending to Buffalo, New York. Joint Appendix [hereinafter, "J.A."] at 21-22; *Field v. Allyn*, 457 A.2d 1089, 1091 (Del. Ch. 1983).<sup>2</sup> In addition to its track, facilities and related operating equipment, the P&LE owned a significant number of rail cars. See, J.A. at 82, 87. To operate that rail system, and to maintain its large car fleet, petitioner employed about 750 people in August 1987, approximately 650 of whom were represented by fourteen of RLEA's member organiza-

<sup>2</sup> *Field v. Allyn* involved a class action by former minority shareholders of the P&LE concerning the 1979 transfer of ownership of the P&LE from the Penn Central Transportation Corporation to a group which includes the current Chief Executive Officer of the P&LE, Gordon E. Neuenschwander. J.A. at 79. That decision examines the P&LE's corporate history during the past few years.

tions and were protected by various collective bargaining agreements covering rates of pay, rules and working conditions. J.A. at 82-83. Those agreements for many employees included "life-time guarantees" of employment with the P&LE. J.A. at 88.

In 1981, the P&LE began to experience financial difficulties, and at first, it turned to its employees to stem its losses by entering into agreements with many of its crafts for certain "concessions." For example, one craft reduced its employment from five days to four days a week; other crafts reduced wages by twelve (12%) percent. J.A. at 87-88; e.g., J.A. at 202. Those concessions "were helpful," but then "events overtook" the P&LE and it began to search for a different solution to its financial difficulties. J.A. at 87. That new solution was the sale of the rail lines for continued rail operations, but with the specific understanding that the new operator would not assume the existing collective bargaining agreements.

### A. Proposed Sale Of The P&LE And Its Impact On Employees

Petitioner's owners considered selling the railroad to existing rail carriers, but those carriers, according to the P&LE's Chief Executive Officer, Gordon E. Neuenschwander, declined the offer "because of the extremely high cost of labor protection" which would have been required by Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347. J.A. at 90.<sup>3</sup> In order to enable the "own-

<sup>3</sup> Sales under the Interstate Commerce Act may be either "acquisitions" under 49 U.S.C. § 10901(a)(3), or "purchases" under 49 U.S.C. § 11343(a)(2), depending upon whether the purchaser is a "newly-formed" or existing railroad, with the latter type being labeled a "purchase." This distinction has become important because the primary difference between the two statutory provisions is that "purchases" are subject to mandatory employee protection under § 11347, whereas the imposition of such protections is discretionary under § 10901. See, *Black v. ICC*, 762 F.2d 106, 116 (D.C. Cir. 1985). In 1982, the ICC decided that it would no longer impose employee protections in Section 10901 cases. *Knox & Kane*

ers of the P&LE Railroad . . . [to] get any value" from their investment (*id.*), the owners decided to structure any sale of the railroad so as to qualify for the class exemption which the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] had issued in January 1986<sup>4</sup> and under 49 U.S.C. § 10505, exempting all newly-formed rail carriers from the prior approval requirements of 49 U.S.C. § 10901. J.A. at 81, 88-90. The advantage of that exemption was that the ICC had ruled in its *Ex Parte 392* decision that it would not impose any conditions on its exemptions to protect employees, unless on a petition to revoke the rail exemption under 49 U.S.C. § 10505(d), rail labor showed that there were "exceptional circumstances" justifying such benefits. See, *FRVR Corp.—Exemption—Acquisition*, ICC Finance Docket No. 31205, served January 29, 1988, reviewed *sub nom. RLEA v. United States*, 861 F.2d 1082 (8th Cir. 1988).

On July 8, 1987, the P&LE entered into an agreement with the Chicago West Pullman Corporation [hereinafter, "CWP"] transportation system<sup>5</sup> to sell the assets of the P&LE, except for certain real estate and approximately 6,000 rail cars, to a newly-formed subsidiary of the CWP system, P&LE Railco, Inc., for approximately \$70 million. J.A. at 22, 80, 87. CWP intended "to fully operate the assets, which would be conveyed to the new company, as a railroad and maintain the same standard of service with much of the same equipment (the locomo-

*R.R.—Acquisition and Operation—Exemption*, 366 I.C.C. 439 (1982).

<sup>4</sup> *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901* [hereinafter, "*Ex Part 392*"], 1 I.C.C.2d 810, 817 (1985), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table).

<sup>5</sup> CWP is a holding company which owned four Class III rail carriers, and formed Chicago West Pullman Transportation Corporation, which in turn owned two other new companies, P&LE Railco, Inc. and PC&Y Holdings, Inc. to acquire the P&LE assets in this case. J.A. at 110-11.

tives), as the current P&LE Railroad does today." J.A. at 80. Railco was to "continue on in the same way as the P&LE" was doing in July 1987, "[s]erving the same identical customers in Western Pennsylvania and Eastern Ohio, and even Northern West Virginia, that the P&LE does today." J.A. at 80. However, one major change which would occur as a result of the sale, was that Railco did not intend to assume or to apply the P&LE rates of pay, rules or working conditions. Rather, Railco intended to operate under entirely new rates of pay, rules and working conditions which would enable it to reduce its employment level to around 220 "agreement" employees. P&LE Brief at 13; App. to P&LE Supp. Brief on Pet. in No. 87-1888 at 1.

When rumors about the proposed sale began to circulate around the P&LE and appeared in several newspaper and television reports (J.A. at 70), the P&LE sent a letter to all of its employees, dated July 31, 1987, advising the employees that (J.A. at 29):

[A]n agreement has now been reached with a subsidiary of Chicago West Pullman Transportation Corporation which, when finalized, would result in its purchase of all the P&LE's rail lines and operating properties. The transaction would also include the purchase of a substantial number of freight cars and all the P&LE's operating locomotives.

There are a number of contingencies which remain before such a sale could be completed, and you will be provided with further details concerning the proposed transaction as additional information becomes available.

That letter was sent to the P&LE employees' representatives on July 30, 1987, along with a statement that in spite of "meaningful efforts" on the employees' part, "we are still faced with continued operating losses and increasing financial pressures. After very serious consideration by top management, it was decided that the proposed sale provided the best solution to the dilemma." J.A. at 70.

Rail labor responded to that letter by informing the P&LE that the proposed change in ownership, "obviously," would "have a significant impact on the working conditions of the P&LE employees" (J.A. at 71), and thus, is a proposed change subject to the notice requirements of Section 6 of the Railway Labor Act, 45 U.S.C. § 156. *Id.* Rail labor also added that the individual organizations were "prepared to meet with the P&LE to negotiate concerning all aspects of this matter including, but not limited to, the decision to sell the rail lines and other assets of the P&LE and the effects of such a transaction on P&LE's employees . . . ." J.A. at 71-72.

Petitioner replied that it was willing to meet with the unions to *discuss* the anticipated sale, but that such a meeting would be without prejudice to its "position that 'Section 6' bargaining under the Railway Labor Act is not necessary or appropriate in this instance." J.A. at 74. According to the P&LE (*id.*):

The anticipated transaction is controlled by the Interstate Commerce Act and is subject to the authority of the Interstate Commerce Commission. Section 6 bargaining, in the railroad's view, would usurp the ICC's authority over the transaction and management's prerogative to conduct the railroad's business as it sees fit.

Most, but not all, of the P&LE unions responded by serving notices on the P&LE under Section 6 of the Railway Labor Act "to negotiate . . . an agreement to ameliorate to the maximum extent possible the adverse impacts which the proposed sale of rail lines, operating properties and other assets will have on employees" represented by the labor organizations. J.A. at 35. Rail labor also filed a complaint on August 19, 1987, with the United States District Court for the Western District of Pennsylvania seeking a declaratory judgment concerning the P&LE's obligations under the Railway Labor Act and an injunction prohibiting the P&LE from selling its rail lines until it had complied fully with the labor statute's dispute resolution process. J.A. at 11.

Petitioner responded to the Section 6 notices by disputing the validity of the notices and once again rejecting any notion that it had an obligation to bargain over the sale or its impact on employees. J.A. at 76. However, petitioner added that it had "no objection to meeting" to *discuss* the sale and it suggested that the meeting be held on September 25, 1987. J.A. at 76-77, 91. Petitioner's Chief Executive Officer testified on September 16, 1987, that the P&LE was willing "to sit down and discuss the situation" with the unions, but it was not willing "to negotiate." J.A. at 91. According to Mr. Neuenschwander, the September 25th meeting was not to be a bargaining session, but rather was to be "an informational meeting only . . . , without prejudice to our position that we have no obligation to bargain that position." J.A. at 92.

#### B. No. 87-1589

When the P&LE failed to agree to meet before the sale would occur, rail labor withdrew its services from the P&LE on September 15, 1987. J.A. at 27, 69. Petitioner responded by seeking a restraining order, but on September 21, 1987, the district court, relying upon Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, denied petitioner's request.<sup>6</sup> J.A. at 2, NR 23.

In the meantime, Railco and the CWP corporate family filed a verified notice of exemption with the ICC on September 19, 1987, and on September 25, 1987, the ICC denied various requests by RLEA to stay the effectiveness of the exemption from Section 10901. Pet. in No. 87-1589 at E-1.<sup>7</sup> On October 5, 1987, petitioner renewed its re-

<sup>6</sup> On September 17, 1987, rail labor and the P&LE entered into an agreement which temporarily resulted in the strike being called off. However, when the CWP system filed its notice of exemption on September 19, 1987, the agreement terminated and the strike was resumed. J.A. at 94-95, 98.

<sup>7</sup> RLEA asked the ICC to reject Railco's Verified Notice of Exemption or, alternatively, to stay the effectiveness of the exemption pending a ruling on the petition to reject. J.A. at 100. RLEA also filed a complaint with the ICC for a cease and desist order assert-

quest for a restraining order and a preliminary injunction (J.A. at 3, NR 31), and on October 8, 1987, the district court granted that request for an interlocutory injunction.<sup>8</sup> Pet. in No. 87-1589 at B-1.

Respondent RLEA appealed that interim injunction, and on October 26, 1987, the Third Circuit issued its opinion reversing the district court's injunction. Pet. in No. 87-1589 at A-1. According to the appellate court, Section 4 of the Norris-LaGuardia Act divested the district court of jurisdiction to enter the strike injunction, and therefore, it summarily reversed that order without considering either RLEA's argument under Section 8 of the anti-injunction Act or the P&LE's reliance on the Railway Labor Act. *Id.* at A-4, A-13. Petitioner P&LE had argued that the Interstate Commerce Act is "comparable to the Railway Labor Act and that, therefore, the prohibitions of the Norris-LaGuardia Act must be accommodated to the ICC's actions . . . ." *Id.* at A-7. That argument was rejected by the Third Circuit because it concluded that (*id.* at A-9) :

Neither 49 U.S.C. § 10901 nor 49 U.S.C. § 11347, the other provision relied on by P&LE which makes the ICC's authority "exclusive" with respect to combinations of carriers, contains any language which would suggest Congress intended to override the anti-injunction policy of Section 4 of the Norris-

ing that the transaction was in reality one between two carriers and, thus, subject to 49 U.S.C. § 11343(a)(2). J.A. at 109. These requests were denied by the decision served September 29, 1987.

<sup>8</sup> Although denominated as a "temporary restraining order," the district court's strike injunction was not of a specific, limited duration, but rather, provided that it "shall remain in effect until this Court rules on the preliminary injunction sought by" P&LE. Pet. in No. 87-1589 at B-10. The court of appeals concluded that it had jurisdiction to review that order under 28 U.S.C. § 1292(a)(1). *Id.* at A-2 n.1. Respondent respectfully submits that this conclusion is correct. *E.g., Pan American World Airways, Inc. v. FEIA*, 306 F.2d 840, 843 (2d Cir. 1962).

LaGuardia Act by the Interstate Commerce Act. The ICC's authority to consider the incidental effect of the transaction on labor and its discretionary authority to require provisions that protect employees do not make the Interstate Commerce Act comparable to the Railway Labor Act, which contains a comprehensive scheme of alternative dispute resolution mechanisms.

### C. No. 87-1888

Rail labor did not resume its strike against the P&LE once the Third Circuit vacated the injunction, but rather asked the district court to grant it summary judgment on its complaint.<sup>9</sup> J.A. at 4, NR 47. On November 23, 1987, the district court orally reaffirmed its earlier conclusion of law of October 8, 1987, that the "dispute between the parties . . . is a major dispute, *i.e.*, one involving a major change, affecting jobs, in an existing collective bargaining agreement." Pet. in No. 87-1589 at B-6; Pet. in No. 87-1888 at 83a. In particular, the court concluded that petitioner had "an obligation to bargain with the representatives of its employees concerning the effects of the sale, pursuant to Section [6] . . . of the Railway Labor Act." J.A. at 212. As the court subsequently explained, until the P&LE complied fully with the Act's bargaining procedures, it could not alter the status quo (Pet. in No. 87-1888 at 83a), which "consists of the rates of pay, rules and working conditions that prevail at the time a § 6 notice is filed." *Id.* Based on that ruling, the court ordered the P&LE to comply with the labor statute's major dispute resolution processes, and enjoined the carrier "from altering the rates of pay, rules and work-

<sup>9</sup> Rail labor's strike succeeded in bringing the P&LE to the bargaining table, although there was a question raised as to whether the P&LE was simply engaging in "perfunctory bargaining." J.A. at 161. On October 14, 1987, one of respondent's member organizations invoked the mediatory jurisdiction of the National Mediation Board [hereinafter, "NMB"] to mediate this dispute under 45 U.S.C. § 155 First. Pet. in No. 87-1888 at 73a.

ing conditions in existence at the time the § 6 notices were given." Pet. in No. 87-1888 at 85a. In particular, the court ordered that (*id.*):

[T]he sale of . . . [the P&LE's] assets is enjoined to the extent that such sale does not include provisions for the maintenance of the status quo, that is, provisions prohibiting the alteration of the rates of pay, rules and working conditions existing at the time § 6 notices were given.

As the district court explained when it issued its earlier oral ruling: "As I indicated . . . , I was not enjoining the sale as such. The Railroad has every right to sell, as long as they maintain the status quo." J.A. at 213. That could be accomplished, the court indicated, by Railco agreeing to assume the employees, the collective bargaining obligations of the P&LE . . . ." *Id.*<sup>10</sup>

Petitioners appealed that ruling to the Third Circuit and on April 8, 1988, the appellate court, with one member of the panel dissenting solely on the conflict of laws

<sup>10</sup> Although the record in this case does not contain any facts pertaining to the bargaining which has occurred since the district court's order, the P&LE has submitted factual statements to this Court on which it now relies to supplement the record in this case. Although RLEA takes strong exception to many of those non-record statements, especially to the inferences which petitioner seeks to draw (*see*, Letter by Counsel for RLEA to Clerk of this Court, dated December 6, 1988), RLEA stipulates that bargaining has occurred both under the auspices of the NMB and independently, in an attempt to find a solution to the pending disputes, and that NMB-sponsored mediation is currently being pursued.

Finally, RLEA respectfully submits that this Court can take judicial notice of the fact, as reported in *RLEA v. P&LE*, 858 F.2d 936, 938 n.1 (3rd Cir. 1988), that the sale agreement to Railco has terminated. However, since the injunction still applies to the P&LE and prevents that railroad from entering into any other sale arrangement which does not preserve the status quo during the Act's bargaining process, RLEA agrees that this case is not moot. *E.g.*, *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

issue, affirmed the district court. After examining the Railway Labor Act contentions of the parties, the court rejected the P&LE's argument that it did not have to bargain because it had a "right" to go out of business, and thus, its sale "would not violate the collective bargaining agreements . . . ." Pet. in No. 87-1888 at 16a. As the court observed (*id.* at 16a-17a; footnote omitted):

The dispute in this case is not about the decision to sell the P&LE's rail lines; it is about the effects of that decision on the employees of the railroad. P&LE does not deny that the sale, as it is now structured, will lead to a substantial reduction in the workforce in the rail line. This loss of jobs by possibly two-thirds of the employees clearly would require a "change in agreements affecting rates of pay, rules, or working conditions." . . . Whenever a party intends to implement such a change, the RLA requires that the party submit to the major dispute resolution process, and not alter the status quo.

Pelying upon this Court's decision in *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969), the court agreed with the district court's conclusion that the "actual, objective working conditions and practices, broadly conceived," which must be preserved, "plainly include the very existence of the workers' jobs." *Id.* at 18a. Judge Hutchison did not dissent from that ruling.

Petitioner's major arguments on its appeal were that the Railway Labor Act was superseded by the Interstate Commerce Act and, even if applicable, was made unenforceable by the ICC's exemption order. Those arguments were also rejected by the majority which stated (*id.* at 6a):

We confess to finding the solution proposed by each party to be unsatisfactory. Dominating our thinking, however, is a reluctance to impinge on a congressional statutory mandate (the RLA) without a clear congressional authorization (and we find

none), or to find an implied repeal of the requirements of the venerable Railway Labor Act without an unavoidable conflict between the mandates of the two statutes (and such a conflict is not ineluctable). See *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). We are particularly reluctant to find such a repeal here, where Congress has so recently addressed itself to deregulating the rail industry, yet has not chosen to relieve management of any of the onerous burdens imposed by the RLA. Moreover, because the Commission's approval of the transaction was merely permissive, we do not view an injunction against the sale as an attack on the ICC's order; and because the approval stemmed from a process in which labor's interests are only one of fifteen factors considered by the Commission, we do not believe that Congress intended that rail labor rely solely on the ICC for protection, to the exclusion of labor's rights under the RLA. For these reasons, we conclude that Congress did not intend the Commission's approval of the transaction without the imposition of substantive labor protective conditions to relieve the railroad of its obligation to comply with the exclusive congressionally-mandated RLA dispute resolution procedures.

### SUMMARY OF ARGUMENT

Railroads have been expanding, contracting and going out of business virtually since the inception of the industry, and since 1920, those corporate restructurings have been regulated by the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* At the same time that Congress gave the ICC the power in 1920 to regulate rail expansions and abandonments, it also enacted a form of regulation of rail labor relations which, due to its gross failings, was replaced by the Railway Labor Act of 1926, 45 U.S.C. § 151, *et seq.* That labor statute, with certain modifications, is still in effect today. Although rail labor relations regulation has existed side-by-side with rail

economic regulation for almost seventy (70) years, there has not been a conflict between the two forms of regulation until recently when the ICC concluded in 1983 that it had exclusive jurisdiction over all labor relations matters arising from corporate restructurings which Congress has instructed it to regulate. This case arises from the P&LE's efforts to use the Commission's intrusion into the field of labor relations, as authority to sell its rail lines for continued rail operations *without* first complying with the notice, negotiation and status quo obligations of the Railway Labor Act.

I. This Court has observed in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960), that rail labor has an absolute right under the Railway Labor Act to insist that a railroad bargain with it for an agreement to deal with the impact of corporate restructurings on employees. That bargaining is entirely proper even though it may "usurp" legitimate managerial prerogatives. Moreover, petitioner had an obligation under Sections 2 First, 2 Seventh and 6 of the labor statute to give its own notice of its intended actions, for its sale will change existing, collectively established, rates of pay, rules and working conditions.

II. In order to make the labor statute's collective bargaining processes effective, Congress has adopted a statutory scheme which requires both parties to a rail labor dispute not to change during the Act's bargaining process the "actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 153 (1969). That obligation extends past the contractual rights of the parties and, instead, looks to the way in which the disputants have actually acted. Consequently, during the Act's bargaining period, petitioner must not sell its rail lines in such

a way that existing jobs are eliminated, or existing working conditions are changed.

III. While both the Railway Labor Act and the Interstate Commerce Act are forms of interstate commerce regulation by Congress, and together form an integrated, harmonious scheme, they are nevertheless distinct forms of regulation. For years, both forms of regulation have co-existed without conflict, and the sole reason that there now appears to be a conflict, is because the ICC believes that it is a labor board, with exclusive jurisdiction over all labor disputes arising from corporate restructurings within its regulatory control. That belief is erroneous, for the transportation statute is a form of minimum standards legislation, entirely distinct from a labor relations statute which fosters collective bargaining to resolve disputes. *Compare, United States v. Lowden*, 308 U.S. 225 (1939), with, *Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943). As their mutual, peaceful co-existence for almost sixty (60) years shows, the two Acts, when viewed properly, are not in conflict, and may be read so as to give effect to each, while preserving their sense and purpose. *Watt v. Alaska*, 451 U.S. 259 (1981). When viewed properly, neither Act overrides the other.

IV. Enforcement of the Railway Labor Act does not constitute a collateral attack on the ICC's exemption order, for the P&LE has not been enjoined from selling to Railco, nor has the injunction in any way set aside or suspended the exemption from regulation under the transportation statute which was accomplished by that exemption order. *Ex Parte 392* cannot be viewed as relieving the P&LE of its Railway Labor Act obligations, for Congress has not given the ICC that power and the ICC's order did not purport to grant such relief. In short, it was for the tribunal called upon to enforce the labor statute—i.e., the district court—to determine in the first instance if the ICC's exemption order overrode the labor statute. *ICC v. BLE*, 482 U.S. — (1987).

V. Besides being unable to establish that the Interstate Commerce Act makes it unlawful for rail labor to strike to compel a railroad to bargain, petitioner cannot show that the Interstate Commerce Act restores to the federal courts jurisdiction which the Norris-LaGuardia Act has withdrawn to enjoin peaceful strikes. Since the transportation statute is not a labor statute, and since the dispute resolution process which the P&LE is attempting to foist upon rail labor is so one-sided, the strictures of the Norris-LaGuardia Act are not lifted by the transportation statute. *Burlington Northern R.R. v. BME*, 481 U.S. 429 (1987); *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, *supra*.

#### ARGUMENT

#### I. CONTRARY TO THE P&LE'S ASSERTIONS, THE RAILWAY LABOR ACT REQUIRES THAT IT NOTIFY AND BARGAIN WITH ITS EMPLOYEES' REPRESENTATIVES OVER ITS INTENTION TO SELL ITS RAIL LINES FOR CONTINUED RAIL OPERATIONS WITHOUT PRESERVING EXISTING RATES OF PAY, RULES AND WORKING CONDITIONS

Confidently asserting that the Railway Labor Act does not apply to its absolute right to change the direction and scope of its business, petitioner P&LE argues that it was not required by the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, either to notify its employees' representatives about, or to bargain with them over, its decision to sell its rail lines to Railco without preserving existing collective bargaining agreements. Petitioner also asserts that its managerial prerogatives immunized it from bargaining with the unions over any demands which would interfere with the expeditious implementation of its decision to sell. Those arguments, respondent RLEA respectfully submits, are without merit, for they are contrary to the plain language of the Railway Labor Act, to its legislative history, to the longstanding custom and

practice in this industry, and to this Court's decision in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960).

#### A. Petitioner's Reliance On NLRA Principles Is Misplaced

To support its assertion that managerial prerogatives, including in particular its quintessential prerogative "to go out of business," are not curtailed by the Railway Labor Act's bargaining processes, petitioner P&LE relies upon principles developed under the National Labor Relations Act [hereinafter, "NLRA"], 29 U.S.C. § 151, *et seq.*, which distinguish between "mandatory" and "permissive" subjects of bargaining and provide that some decisions which lie at the core of an employer's entrepreneurial control are not mandatory subjects of bargaining. Petitioner, joined by the *amici*, argue that those principles "translate with equal force" into the Railway Labor Act context (U.S. Brief at 17), but then they disagree amongst themselves over the result of that translation to this case. Depending upon their view of the related status quo concept, some *amici* argue that there is a duty on the P&LE's part to bargain over the impact of its decision to sell, while others assert that there is no such duty.<sup>11</sup> Compare, Air Con Brief at 4-12, and U.S. Brief at 17-21, with, NRLC Brief at 20-28.

<sup>11</sup> For example, the National Railway Labor Conference [hereinafter, "NRLC"] takes the position that neither the decision to sell nor its effect on employees is a mandatory subject of bargaining under the Railway Labor Act, but the NRLC recognizes that under the Railway Labor Act, labeling "effects bargaining" as a required subject of bargaining would mean that the Act's status quo obligation would delay implementing the *sale* until bargaining over effects was completed. NRLC Brief at 26. Both the United States and the Airline Industrial Relations Conference [hereinafter, "Air Con"] assert that effects bargaining is appropriate, but erroneously view the Act's status quo obligations as applying solely to *contractual* rights. *E.g.*, U.S. Brief at 19-21, 23; Air Con Brief at 14-21.

Respondent RLEA respectfully submits that the reason for this diversity of opinion amongst the *amici* is that they, like the P&LE, are attempting to apply principles developed under one statutory scheme to another statute without a full appreciation of the crucial distinctions between the two statutes. Unlike the NLRA, the Railway Labor Act was designed to apply to a heavily *regulated* industry and was intended by Congress to prevent strikes by eliminating the need to strike. *E.g.*, *Burlington Northern R.R. v. BMWE*, 481 U.S. 429, 444, 451 (1987). To accomplish that primary goal, Congress adopted a dispute resolution scheme that imposes a *broad* bargaining obligation which is triggered by certain actions and carries with it an equally broad status quo obligation which restricts equally both management and employee rights during that bargaining process. *E.g.*, *Chicago & North Western Ry. v. UTU*, 402 U.S. 570, 574-75 (1971); *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 150 (1969). Because the focus of the NLRA is quite different, that statute's bargaining structure, including its reliance on the status quo concept to achieve its objectives, is materially different.<sup>12</sup> However, petitioner and the *amici* fail to appreciate these crucial differences.

<sup>12</sup> Petitioner and several *amici* argue that the bargaining obligation under the NLRA is broader than that under the Railway Labor Act, and they support that argument by contrasting the term "working conditions" in Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, with "conditions of employment" in Section 8(d) of the NLRA, 29 U.S.C. § 158(d). That argument is frivolous, for it ignores the overall language of Section 2 First which requires the parties "to exert *every reasonable effort* to make and maintain agreements concerning rates of pay, *rules*, and working conditions, and to settle *all* disputes, whether arising out of the application of such agreements *or otherwise . . .*" 45 U.S.C. § 152 First (emphasis added). Section 8(d)'s language is not as broad. Moreover, petitioner's reliance on Senator Wagner's reservations with the "Taft Bill" (*see*, 93 Cong. Rec. 3427-28 (April 11, 1947) (Remarks of Sen. Wagner)), is misplaced, for Senator Wagner's objection to the use of the term "working conditions" was but one part of an

This Court has *emphasized* on many occasions that principles developed under the NLRA “cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes.” *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969) (footnote omitted); *see also*, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686-87 n.23 (1981). This case presents an excellent example of the need to heed that admonition.<sup>13</sup>

Petitioner's and the *amici*'s reliance on NLRA principles is misplaced here, for the two basic NLRA premises upon which the P&LE relies—*i.e.*, an employer has an absolute right to go out of business without delay, and an employer generally need not bargain over a de-

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objection to the language of a larger proposal that attempted to define in detail “collective bargaining” in a manner which the opponents opined would “limit narrowly the subject matters appropriate for collective bargaining.” H. Rpt. No. 245, 80th Cong., 1st Sess. at 71 (1947) (Minority Report). As the House Minority stated in voicing that opposition (*id.*): “The appropriate scope of collective bargaining cannot be determined by a formula.” Finally, the assertion that bargaining under the Railway Labor Act is *narrower* than bargaining under the NLRA is contrary to this Court's perception of that bargaining obligation. *See*, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 687 n.23 (1981).

<sup>13</sup> One reason why it is inappropriate to adopt for the Railway Labor Act the distinction between mandatory and permissive subjects of bargaining is that, unlike the NLRA, the Railway Labor Act does not have an “administrative [adjudicative] agency skilled in the field and competent to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country, subject to review by the courts.” H. Rpt. No. 245, *supra*, note 12, at 71; *see*, *Chicago & North Western Ry. v. UTU*, *supra*, 402 U.S. at 580-81. Such an agency is clearly necessary to draw the subtle differences between mandatory and permissive subjects of bargaining.

cision to alter the basic scope of his business—do not apply to this case or, more importantly, do not apply to regulated industries such as railroads, where any railroad seeking to go out of business must obtain the prior approval of the ICC. *E.g.*, 49 U.S.C. § 10903.

To support its assertion that it has an absolute right to go out of business (something which it did not plan to do), petitioner relies upon this Court's decision in *Textile Workers v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965).<sup>14</sup> That reliance, however, is misplaced, for *Darlington's* rationale does not apply to the Railway Labor Act. In *Darlington*, this Court stated that “so far as the . . . [NLRA] is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases,” 380 U.S. at 268, but explained that it reached that conclusion because (*id.* at 270):

A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act.

What petitioner and the *amici* ignore, however, is that the proposition that a railroad *could* go out of business whenever it wished, would have been a startling innovation in 1926, for it was an accepted fact when the Railway Labor Act was enacted in 1926, 44 Stat. 577, that a railroad's exit from the industry was limited by congressional regulation.

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<sup>14</sup> *Darlington* is of little comfort to the P&LE, since this Court observed in *Darlington* that when it was speaking of going out of business *entirely*, it was referring to a liquidation and not to the “sale of a going concern, which might present different considerations . . .” 380 U.S. at 272 n.14. Here, the P&LE was being sold as a going concern; moreover, the P&LE was not dissolving. J.A. at 80, 87.

Railroads, almost from their inception and often at their own request, have been regulated, first by the States and then by the federal government. See, *Transit Comm. v. United States*, 289 U.S. 121, 127 (1933); Act to Regulate Commerce of 1887, ch. 104, 24 Stat. 379. By 1926, that federal regulation included restrictions on a railroad's ability to sell, merge, consolidate or abandon its lines without prior ICC approval. Transportation Act of 1920, ch. 91, 41 Stat. 456, 476-78, 480-82. Moreover, railroads were excluded from the class of persons who could take advantage of the bankruptcy laws, and even when railroads were permitted to take advantage of those laws in 1933 (ch. 204, 47 Stat. 1467, 1474), they were prohibited from liquidating.<sup>15</sup> See, S. Rpt. No. 95-989 at 12 (1978). As this Court explained in *Wilson v. New*, 243 U.S. 332, 347 (1917):

That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business, and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, state and Federal, and is illustrated

<sup>15</sup> That restriction did not end until 1978 with the enactment of Section 1174 of the Bankruptcy Code by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2644. The reason for these early restrictions on railroads from being debtors under the bankruptcy laws was explained by the Court in *Continental Illinois National Bank v. Chicago, Rock Island & Pac. Ry.*, 294 U.S. 648, 671-72 (1935), as follows:

A railway is a unit; it cannot be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a going concern. Its activities cannot be halted because its continuous, uninterrupted operation is necessary in the public interest; and, for the preservation of that interest, as well as for the protection of the various private interests involved, reorganization was evidently regarded as the most feasible solution whenever the corporation had become "insolvent or unable to meet its debts as they matured."

by such a continuous exertion of state and Federal legislative power, as to leave no room for question on the subject.

Consequently, unlike an investor in a typical business subject to the NLRA, investors in the rail industry, "by their entry into a railroad enterprise[,] assumed the risk that" their interests would be subject to the public interest in continued rail service. *Reconstruction Finance Corp. v. Denver & Rio Grande Western R.R.*, 328 U.S. 495, 536 (1946).

When the Railway Labor Act and its legislative history are examined, it becomes clear that Congress, in furtherance of its legitimate power to regulate interstate commerce, adopted a labor dispute resolution scheme for the rail industry that strives to prevent interruptions to commerce by preventing the need to strike. E.g., *Burlington Northern R.R. v. BMW*, *supra*, 481 U.S. at 451-52; *Detroit & Toledo Shore Line R.R. v. UTU*, *supra*, 396 U.S. at 150. To accomplish that objective, the Railway Labor Act imposes a deliberately long bargaining process and prevents both "the union from striking and management from doing anything that would justify a strike" during that bargaining process. *Detroit & Toledo*, *supra*, 396 U.S. at 150. By restraining both sides to the dispute from taking unilateral action to change the status quo, and by imposing a process which has built in delays before those restraints are lifted, Congress adopted in 1926 a statutory scheme which makes the threat of a strike or unilateral action almost irrelevant in creating bargaining leverage. Rather, the ability which the Act gives the party opposing the change to *delay*, creates that leverage and encourages the party proposing the change to compromise. *Id.*

The Act's bargaining and status quo obligations, thus, clearly impose restrictions on management's rights, but the drafters of these obligations deliberately imposed

those restrictions, relying upon Congress' power to regulate commerce to sanction those restrictions. *Hearings on S. 2646, Before Subcomm. of the Senate Committee on Interstate Commerce, 68th Cong., 1st Sess. at 18 (1924) (Statement of D.R. Richberg).*<sup>16</sup>

Petitioner and the amici center upon the delay inherent in bargaining under the Railway Labor Act, and argue that this Court's opinion in *First National Main-*

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<sup>16</sup> This aspect of a railroad's existence is the death knell for petitioner's "taking" argument. P&LE Brief at 66-70. Petitioner acknowledges that "[b]ecause railroads are infused with the public interest, unlike other businesses they cannot unilaterally implement management decisions to expand or shrink their systems or go out of business, but must first obtain ICC approval." *Id.* at 35. Just as a reasonable delay in order to obtain prior ICC approval is permissible, and is not a taking under the Fifth Amendment, *e.g.*, *Penn Central Merger Cases*, 389 U.S. 486, 511 (1968), so, too is a reasonable delay necessary to comply with the Railway Labor Act's regulation of commerce not a taking.

This Court has observed before that "whether a particular restriction will be rendered invalid [as a "taking"] by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). One such circumstance is "the extent to which the regulation has interfered with distinct investment-backed expectations" (*id.*), and, as this Court noted, a "taking" will be more readily found when there is a physical taking "than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* *Andrus v. Allard*, 444 U.S. 51, 64-68 (1979).

Here, the delay is necessary to enforce the Railway Labor Act's bargaining commands, which while long and drawn out, do have an end, and are designed to serve a legitimate governmental interest. *Accord, Texas & New Orleans R.R. v. Brotherhood of Railway Clerks*, 281 U.S. 548, 570 (1930); *Wilson v. New*, *supra*, 243 U.S. at 347-48. Consequently, the fact that complying with the Railway Labor Act may bring about an agreement which results in the P&LE's market value being less than that offered by Railco, does not turn this case into a taking. *Penn Central Transportation Co. v. New York City*, *supra*.

*tenance* immunizes the P&LE from bargaining over its *decision* to sell. There is no need, however, for this Court to decide in this case whether *First National Maintenance* should be made applicable to the Railway Labor Act, for this case does not involve "decision" bargaining. Rail labor is not arguing that the P&LE must bargain over whether it should sell, and if so, to whom.<sup>17</sup> Rather, rail labor has asserted and continues to maintain that when a railroad decides to sell its business in such a way that it does not preserve the existing rates of pay, rules, or working conditions of the employees who will be affected by that sale, that railroad is prohibited by Sections 2 First and 2 Seventh from doing so until it has first complied with the Act's bargaining process as set forth in Section 6. Moreover, the P&LE unions served their own Section 6 notices on petitioner to obtain agreements which would deal with the impact of such a sale on employees' rates of pay, rules and working conditions (*e.g.*, J.A. at 35, 38-39) and these notices independently triggered petitioner's obligation under Section 2 First to settle these disputes.

If this case were under the NLRA, petitioner would have violated Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), by not giving its unions "a significant opportunity to bargain about . . . matters of job security as part of the 'effects' bargaining mandated by § 8(a)(5)." *First National Maintenance*, *supra*, 452 U.S. at 681. Moreover, "under § 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time . . ." *Id.* at 681-82. That has not occurred here, for during 1987 the P&LE did not provide the unions with any information about the details of the sale, the contingencies which must be

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<sup>17</sup> During the bargaining which did occur, respondent RLEA, at the P&LE's request, did put forth an employee purchase proposal (J.A. at 158), but rail labor has not put that proposal into a formal Section 6 notice, nor has it refused to bargain over traditional effects proposals.

satisfied before there would be a closing, or what impact the sale would have on those crafts who would continue to perform work in connection with the property which the P&LE would continue to own and utilize (J.A. at 178-81, 185-86), even though rail labor specifically requested that information. *Id.*; J.A. at 31-34. In short, even if *First National Maintenance* applied to the Railway Labor Act, petitioner would have had an obligation to give notice and to bargain over the impact of the sale on employees.

However, this case is under the Railway Labor Act, and thus it is *to that Act and to its procedures* that this Court must look to determine whether petitioner has attempted to bargain in a "meaningful manner and at a meaningful time" over the impact of its decision to sell on employees.

**B. The Railway Labor Act Required Petitioner To Bargain Over Rail Labor's § 6 Notices**

As this Court has explained, the duty in Section 2 First of the Railway Labor Act "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise," is the "heart" of the Act. *E.g., Chicago & North Western Ry. v. UTU*, *supra*, 402 U.S. at 574. That duty clearly required petitioner to bargain with its unions over the notices which they served in August and September 1987 to negotiate for agreements which would give employees guaranteed employment, or pay, if deprived of employment. J.A. at 42. Those bargaining proposals, including the proposed penalty pay to prevent the loss of employment, clearly dealt with rates of pay, rules and working conditions and, as this Court explained in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, *supra*, 362 U.S. at 338, are bargainable under the Railway Labor Act, even if they infringe upon management's preroga-

tives. The same is also true of rail labor's request that the P&LE obtain the buyer's commitment to assume all existing collective bargaining agreements, including the protective agreements which the unions were seeking to negotiate (J.A. at 42), for that proposal also dealt with rates of pay, rules and working conditions and was designed to implement the past practice in the rail industry that corporate transactions be accomplished in such a manner that existing collective agreements are preserved. *See*, 49 U.S.C. § 11347, incorporating 45 U.S.C. § 565(b); *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). While these proposals clearly infringe upon management's prerogatives to operate the business in the most economical manner, they are nevertheless entirely consistent with the purposes and scheme of the Railway Labor Act's bargaining processes.

In *Order of Railroad Telegraphers*, this Court was faced with a railroad's refusal to bargain with a union over its decision to close agency stations and to consolidate those agency functions. Moreover, the carrier also refused to bargain over a notice which the union had served under Section 6 of the Act seeking an agreement to prohibit the railroad from abolishing any agent's job "except by agreement." 362 U.S. at 332. In considering whether Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, deprived the federal courts of jurisdiction to enjoin a strike over the railroad's refusal to bargain, this Court addressed the question of whether the "union's effort to negotiate about the job security of its members 'represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations.'" 362 U.S. at 336, *quoting* court of appeals' decision. After examining the purposes of the Railway Labor Act and the Interstate Commerce Act as they relate to "stable and fair terms and conditions of railroad employment" (362 U.S. at 330-31), this Court stated (362 U.S. at 338; *emphasis added*):

In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. *It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large.*

Respondent RLEA respectfully submits that the reasoning of that case is applicable here, for rail labor has sought throughout this litigation to influence the P&LE to preserve employment and the employment rights of its members to the maximum extent practicable, while at the same time assuring the continued viability of the P&LE or its successor. Rail labor's efforts to obtain through bargaining an agreement preserving the employment of P&LE employees is exactly the type of dispute which Congress intended to be resolved under the Railway Labor Act's bargaining process. Indeed, as respondent shows in Argument III, *infra*, Congress' intent on this point could not be clearer. Thus, the lower courts were correct in holding that rail labor's Section 6 notices triggered the P&LE's bargaining obligation under the Railway Labor Act.

### C. The Railway Labor Act's Language And Its Legislative History Required Petitioner To Give Notice And To Bargain

Not only does the P&LE have the duty to bargain with rail labor over the Section 6 notices which the unions served, but the P&LE was also obligated by Section 2 First, 2 Seventh and 6 of the labor statute to serve its own Section 6 notice concerning the impact which its decision to sell would have on the existing col-

lective bargaining agreements of its employees.<sup>18</sup> That notice obligation existed in this case because the P&LE intended to sell in such a way that it would effectively terminate the collective bargaining agreements of its employees.<sup>19</sup> *E.g.*, *Burlington Northern R.R. v. UTU*, 848 F.2d 856, 864 n.9 (8th Cir.), *cert. denied sub nom. ICC v. BN*, Sup. Ct. No. 88-711 (November 28, 1988); *United Industrial Workers v. Board of Trustees*, 351 F.2d 183 (5th Cir. 1965).

Petitioner asserts that it did not have an obligation to give notice and to bargain about its proposed sale to Railco because its sale would not *violate* any existing agreement. P&LE Brief at 28-29. That argument is without merit, for as the court of appeals noted, the "loss of jobs by possibly two-thirds of the employees clearly would require a 'change in agreements affecting rates of pay, rules, or working conditions.'" Pet. in No. 87-1888 at 17a, *quoting* 45 U.S.C. § 156. Whether or not the proposed *change* would *violate* the agreements is entirely irrelevant, for the crucial inquiry which must be

<sup>18</sup> Petitioner maintains that its sale would not terminate its agreements, because the P&LE would continue to honor any obligations which continued to exist. J.A. at 197. However, the P&LE also maintained that its existing job guarantees would *end* once it sold its assets. *Id.* Moreover, once the assets are sold it is clear that for all practical purposes the existing collective bargaining agreements, except for those covering crafts whose work will remain with the P&LE's corporate shell (*see*, J.A. at 178-86), will terminate. *See, Western Airlines, Inc. v. IBT*, 480 U.S. 1301 (1987) (O'Connor, J., in Chambers).

<sup>19</sup> Respondent RLEA is *not* asserting that the decision to sell triggered the P&LE's notice obligation. Rather, it was the decision to sell *in such a way* that existing agreements would effectively be terminated that triggered the notice obligation. For example, when the P&LE's current owners purchased the railroad in 1979, they did not change existing collective bargaining agreements (*see, Field v. Allyn, supra*), and thus, did not trigger the Act's notice obligation.

made under Section 2 First and 2 Seventh is whether the decision of management will adversely affect the collectively established wages or working conditions of employees who are represented by a union; if it will, the Act requires that notice be given.<sup>20</sup>

Sections 2 First and 6 of the Railway Labor Act were first enacted in 1926, but can be traced to Section 301 of the Transportation Act of 1920, *supra*, 41 Stat. at 469. That provision of the 1920 Act, imposed a non-enforceable duty upon labor and management "to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof." 41 Stat. at 469. *See, Pennsylvania Railroad System v. Pennsylvania R.R.*, 267 U.S. 203, 215-17 (1925). Rather than create judicially enforceable duties, the 1920 Act created a board composed of labor, management and public members (the Railroad Labor Board) to decide unresolved labor disputes, but relied upon only moral persuasion and public opinion to enforce the board's decisions. *Id.* That system, for a variety of reasons, proved to be a failure, and in 1924 rail labor proposed a bill (*i.e.*, the Howell-Barkley bill) which contained, with a few exceptions not relevant here,<sup>21</sup> Section 2 First and 6 of the 1926 Rail-

<sup>20</sup> Not all changes in established "rules or working conditions," however, give rise to the notice obligation, for Section 2 Seventh deals with rates of pay, rules or working conditions *as embodied in agreements*. Thus, if a working condition is not part of an agreement, either written or implied, notice need not be given. But, if the union seeks to bargain over that change by including it under the written agreement, Section 2 First requires bargaining and Section 6 requires that that practice not be changed during the Act's bargaining phase. *Detroit & Toledo, supra*, 396 U.S. at 152-54. In other words, the scope of the Act's status quo obligation is *broader* than the scope of Section 2 Seventh's notice requirement.

<sup>21</sup> Section 2 of the Howell-Barkley bill, with minor word changes, became Section 2 First in 1926 and has not been modified since.

way Labor Act. *See*, H.D. Wolf, THE RAILROAD LABOR BOARD at 407-15 (Univ. of Chicago Press 1927); *see*, S. 2646, 68th Cong., 1st Sess. (February 28, 1924). Rail labor's statements to Congress explaining that bill, RLEA respectfully submits are thus highly relevant in construing the intent of those provisions of that bill which were subsequently agreed to by management, and adopted by Congress as the Railway Labor Act. *See*, THE RAILROAD LABOR BOARD at 414-16.

In March and April 1924, representatives of rail labor testified before a subcommittee of the Senate Committee on Interstate Commerce to whom the Howell-Barkley bill had been referred, and explained that their proposal was essentially "an industrial code for the railroads made up from the written and unwritten laws that have governed industrial relations on the railroads for many years." *Hearings on S. 2646, supra*, at 16 (Statement of D.B. Robertson). One such existing "law" was *Decision No. 119* of the Railroad Labor Board, 2 R.L.B. Dec. 87 (1921), in which the Board promulgated certain "principles" with which it opined all collective agreements should be consistent. 2 R.L.B. Dec. at 91. As relevant here, one of those principles was that: "The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management." *Id.* at 96.<sup>22</sup>

Section 6(A) of the 1924 bill became Section 6 in 1926 with one change; a sentence dealing with joint conferences was added as the second sentence of the 1926 Act (44 Stat. at 582), but was deleted in 1934. Section 6, as it exists today, was also amended in 1934 when Congress added the words "in agreements" to the first sentence. *See*, pages 35-36, *infra*.

<sup>22</sup> That "principle" read in its entirety as follows (2 R.L.B. Dec. at 96):

7. The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management. This right of participation shall be deemed adequately complied with if and

Rail labor drafted Section 2 First and 6 of the Railway Labor Act with the express intent of codifying this fundamental principle that employees be consulted before management takes any action which would adversely affect their rates of pay, rules or working conditions. First, Mr. Donald R. Richberg, counsel for rail labor, explained that the duty which is now imposed by Section 2 First, "is the foundation principle of the [proposed] railway labor act." *Hearings on S. 2646, supra*, at 17. Next, Mr. Richberg noted that the important controversies between labor and management had grown out of changes to existing wages and working conditions sought by the employees or by the managements, and labor's bill addressed that problem by providing (*Hearings on S. 2646, supra*, at 201; emphasis added):

Now, the proposed bill provides that there shall be no changes without notice. The present Labor Board, in a statement of principles in Decision No. 119, stated, "the right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by the management."

In the rules established in Decision No. 222 by the Labor Board 30 days' notice was required for all changes. Section 9 of the Newlands Act [ch. 6, 38 Stat. 103, 107-08 (1913)] provided that Federal receivers should not make reductions of wages upon less than 20 days' notice of a hearing upon the receivers' petition. The requirement of notice of changes is not unreasonable or new; *it is obviously an essential to peaceful operation under agreements whereby neither party may be suddenly confronted with a peremptory demand for a change*, whereby the fear of such a demand hangs always over the heads of both parties.

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when the representatives of a majority of the employees of each of the several classes directly affected shall have conferred with the management.

Mr. Richberg's statements before the Senate Subcommittee in 1924 also made it clear that Sections 2 First and 6 required advance notice of an intended *change* in collectively established working conditions, even if the change would not *violate* an agreement. As Mr. Richberg explained (*Hearings on S. 2646, supra*, at 20):

This prohibition against arbitrary action is a clear necessity in founding industrial peace upon contractual obligations. While an agreement is in force, of course, it should not be changed without consent. *If an agreement is about to expire then either party desiring a change should be required to give ample opportunity for negotiation of a new agreement.*

The purpose of this provision is, as you will see, to prevent a situation drifting up to the date of expiration of an agreement and then peremptorily demanding, the one side or the other, a change in the agreement. *Under the provisions of this bill, if either side wants a change, since 30 days' notice must be given if they want a change to take place at the end of the existing agreement, they must start negotiations beforehand.*

If no notice of intended change were given, or if the bargaining process was still underway, the agreement continued, notwithstanding its expiration clause. *Id.* at 22-23.

If there were any questions remaining after the enactment of the Railway Labor Act of 1926 as to whether Sections 2 First and 6 were intended to prohibit unilateral *changes* in collective rates of pay, rules and working conditions, even if those changes did not *violate* an agreement, and even if those changes were the result of a decision by management to change the direction or scope of the business, those questions were laid to rest by Section 2 Seventh of the Railway Labor Act which was enacted as part of the 1934 amendments to that Act. Ch. 691, 48 Stat. 1186.

Although Sections 2 First and 6 were intended to require notice and bargaining before existing rates of pay, rules or working conditions were changed, those obligations were not always complied with when railroads went into the hands of equity receivers, or when railroads made operational changes. *Hearings on H.R. 5500, Before House Committee on Interstate and Foreign Commerce*, 73rd Cong., 1st Sess. at 102 (1933) (Statement of D.R. Richberg). In 1933, Congress addressed those problems.

First, in March 1933 when it enacted various amendments to the Bankruptcy Act of 1898, it included in its railroad reorganization amendment (i.e., Section 77) provisions which "reenact[s] the law that was passed six or eight years ago [i.e., the Railway Labor Act]" and specifically applied those provisions to trustees and federal courts sitting as railroad reorganization courts. 76 Cong. Rec. 5359 (March 1, 1933) (Remarks of Rep. Parker); see also, 76 Cong. Rec. at 5119 (Remarks of Sen. Norris) and 5358 (Remarks of Rep. LaGuardia). One of those provisions, Section 77(o),<sup>23</sup> prohibited the trustees or courts, while in possession of the debtor's property, from "chang[ing] the wages or working conditions of railroad employees" except in compliance with the Railway Labor Act. That legislation was specifically intended to preserve existing wages, rules or working conditions when a railroad went into reorganization, and to make any proposed change subject to the Railway Labor Act's dispute resolution provisions; it has had that effect. 76

<sup>23</sup> Section 77(o), 47 Stat. at 1481, provides as follows:

(o) No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees, except in the manner prescribed in the Railroad Labor Act, or as set forth in the memorandum of agreement entered into in Chicago, Illinois, on January 31, 1932, between the executives of twenty-one standard labor organizations and the committee of nine authorized to represent Class 1 railroads.

Cong. Rec. at 5118 (Remarks of Sen. Norris), 5355 (Remarks of Rep. Summers), and 5356 (Remarks of Sen. Blanton); accord, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522, 528 (1984).

Less than four (4) months after the 1933 Bankruptcy Act Amendments were enacted, Congress passed the Emergency Railroad Transportation Act of 1933 [hereinafter, "ERTA"], ch. 91, 48 Stat. 211, and required all railroads to comply with Section 77(o) of the Bankruptcy Act. ERTA § 7(e), 48 Stat. at 214.<sup>24</sup> That legislation, including Congress' specific direction that rail labor be included in the consideration of proposed changes in the scope and direction of railroad operations when those decisions would affect employees (§ 7(a), 48 Stat. at 213-14), reflects a clear congressional intent to give rail labor a broad role in entrepreneurial decisions.

In order to meet the financial demands which the Depression placed upon them, many railroads attempted to restructure their systems and coordinate their operations with other carriers. Those actions, of course, affected employees and their existing collective bargaining rights, for as Mr. Richberg explained to Congress while that body was considering the ERTA: "When you consolidate traffic, when you eliminate services, you raise inevitably new questions as to the seniority rights of the men affected and as to the working conditions; and frequently questions as to applications of agreements to the

<sup>24</sup> Section 7(e) provided as follows (48 Stat. at 214):

Carriers, whether under control of a judge, trustee, receiver, or private management, shall be required to comply with the provisions of the Railway Labor Act and with the provisions of section 77, paragraphs (o), (p), and (q), of the Act approved March 3, 1933, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States'", approved July 1, 1898, and Acts amendatory thereof and supplementary thereto.

payment of wages." *Hearings on H.R. 5500, supra*, at 102. As Mr. Richberg added (*id.*; emphasis added):

I think the committee will realize that the seniority rights which men gain over 10, 15, 25, 30 years of service are valuable rights that should be preserved. They are the incentives in this industry that keep men in the industry, among other incentives. They are the results of a lifetime of work. They are accumulations just as much as savings. They are protections of a man's livelihood. And to say that those shall be swept aside, *changed and altered* by the arbitrary will of a management without consultation at all with the labor group is in the first place directly in violation of the principle and the letter of the present Federal law, the Railway Labor Act; and in the second place is in violation of any ordinary consideration for the rights of men who work.

To prevent a continuation of the problems which rail labor experienced with carriers who unilaterally coordinated their operations, and to make the proposed legislation, which would give the government the power to *compel* coordinations and other changes in operations, workable, rail labor suggested that unions be consulted by the regional coordinating committees and by the Federal Coordinator *before* ordering coordinations. *Hearings on S. 1580, Before Senate Committee on Interstate Commerce*, 73rd Cong., 1st Sess. at 85 (Statement of D.R. Richberg). Rail labor also requested that the recent "labor" amendments to the Bankruptcy Act be made applicable to all railroads. *Id.* at 105-06; *Hearings on H.R. 5500, supra*, at 108. Those proposals were made in order to "make effective what was considered to be the purpose of the Railway Labor Act" (*Hearings on H.R. 5500, supra*, at 163), which rail labor maintained prohibited what by 1932 had become "quite a general practice in informing the employees by a bulletin [effective immediately and unilaterally] as to what was going to be done, al-

though it made a complete change in working conditions and rates of pay." *Id.* at 162.

Congress enacted the substance of rail labor's proposals when it enacted the ERTA. 77 Cong. Rec. 4256 (May 26, 1933) (Remarks of Sen. Dil.); 77 Cong. Rec. 4870 (June 2, 1933) (Remarks of Rep. Cooper).

Because the ERTA was intended to be temporary legislation, the proponents of the 1934 amendments to the Railway Labor Act requested that Congress include the substance of Section 77(o) of the Bankruptcy Act as Section 2 Seventh of the Act. *See, Hearings on S. 3266, Before Senate Committee on Interstate Commerce*, 73rd Cong., 2d Sess. at 13-14 (1934) (Statement of Joseph B. Eastman).<sup>25</sup> As initially proposed by Commissioner Eastman, Section 2 Seventh provided: "No carrier, its officers or agents shall change the rates of pay, or working conditions of its employees, except in the manner prescribed in section 6 and in other provisions of this Act relating thereto." *Hearings on S. 3266, supra*, at 3.

During the hearings before the Senate Committee on Interstate Commerce, the carriers' representative, W.M. Clement, proposed that Commissioner Eastman's language be amended to read as Section 2 Seventh presently does for the following reason: "This is proposed because the working conditions are not defined in the act. They are covered by agreement, and we believe this is a helpful suggestion." *Hearings on S. 3266, supra*, at 65. Mr. Clement also suggested that Section 6 of the 1926 Act be amended to add "in agreements" after the word "change" in the first sentence "for definiteness and clarity." *Id.* at 73.

<sup>25</sup> Commissioner Eastman was a member of the Interstate Commerce Commission and the Federal Coordinator created by the ERTA. This Court has recognized that Commissioner Eastman was "one of the weightiest voices before Congress on railroad matters . . ." *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 304 (1954).

Commissioner Eastman stated that the amendments were acceptable to him; the Section 2 Seventh amendment, he stated, was "an improvement, and should be made" (*id.* at 151), and the Section 6 amendment was one he "favored." *Id.* at 155. Congress adopted both modifications.

Thus, the very language of Sections 2 First, 2 Seventh and 6 of the Railway Labor Act, their legislative history, and this Court's decision in *Order of Railroad Telegraphers*, all compel the conclusion that Congress has determined that whenever a carrier intends to take an action that will adversely affect existing, collectively established, rates of pay, rules or working conditions, it must give notice, and it must bargain if requested to do so by rail labor. Petitioner's decision to sell to Railco, therefore, required that it give notice and bargain over the impact which that decision would have on existing rates of pay, rules and working conditions.

**II. SINCE THE VERY EXISTENCE OF THE EMPLOYEES' JOBS IS AT THE HEART OF THIS DISPUTE, THE RAILWAY LABOR ACT REQUIRES THAT THESE JOBS BE MAINTAINED UNTIL THE PARTIES HAVE COMPLIED FULLY WITH THE ACT'S MAJOR DISPUTE RESOLUTION PROCESSES**

Petitioner P&LE argues that the Railway Labor Act does not restrict management's right during the Act's status quo period, and that unless it has entered into either an express or an implied agreement with rail labor which restricts those fundamental management rights, it may exercise those rights during the bargaining period. See, P&LE Brief at 28, 32. Several of the *amici*, including the Solicitor General, but notably not the NRLC, advance similar arguments. Those arguments, however, are fundamentally at odds with the Act's bargaining scheme and have been squarely rejected by this court in *Detroit & Toledo*.

As this Court noted in *Detroit & Toledo*, 396 U.S. at 150, there are three distinct status quo provisions in the Act, Sections 6, 5 First and 10 (45 U.S.C. §§ 156, 155 First and 160), each covering a different stage of a dispute over changes. These provisions, however, must be read in conjunction with the fundamental duty imposed by Section 2 First of the Act, and even though the language varies from section to section, this Court observed that (396 U.S. at 152-53; footnote omitted; emphasis added):

[W]e believe that these provisions, together with § 2 First, form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day "cooling-off" period. Although these three provisions are applicable to different stages of the Act's procedures, the interest and effect of each is identical so far as defining and preserving the status quo is concerned. The obligation of both parties during a period in which any of these status quo provisions is properly invoked is to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.

That interpretation of the Act's status quo obligation clearly requires that more than express or implied *agreements* be preserved, and indeed, requires that the parties not change the actual and objective manner in which they have acted toward each other prior to the time the dispute arose. That construction of the Act, RLEA respectfully submits, is compelled by its legislative history and, in this case, fully supports the lower court's conclusion that the status quo "include[s] the very existence of the workers' jobs." Pet. in No. 87-1888 at 18a.

When the proposed Railway Labor Act was presented to Congress in 1926, both management's and labor's spokesmen informed the Congress that it was their belief

that the proposed legislation could prevent strikes primarily because their bill prohibited either side from doing anything which would bring about an interruption to commerce *until after* they had complied fully with the bill's dispute resolution processes. *E.g., Hearings on S. 2646, Before Senate Committee on Interstate Commerce*, 69th Cong., 1st Sess. at 16 (1926) (Statement of Alfred P. Thom); *Hearings on H.R. 7180, Before House Committee on Interstate and Foreign Commerce*, 69th Cong., 1st Sess. at 92-93 (1926) (Statement of D.R. Richberg). To accomplish that objective, the bill's draftsmen used the broadest phrase possible "to make it clear that the parties were going to wait [before making a change] and give the Government full opportunity to adjust the controversy." *Hearings on S. 2646, supra*, at 88-89 (Statement of D.R. Richberg). That phrase appears in Section 10 of the Act, and provides that "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." 45 U.S.C. § 160.

That phrase clearly restricts management's ability to exercise its related managerial prerogatives during the period that the status quo obligation is invoked, and indeed, that was its intent. As Mr. Richberg explained: "The thought was to include in the broadest way all the factors which contributed to what is commonly called the status quo. In other words, the conditions may depend upon the dispute, whether it is with regard to rules or with regard to wages." *Hearings on H.R. 7180, supra*, at 44. Mr. Richberg added that it would have been fairly easy to use language which would specifically prohibit strikes, but the "freeze" obligation was to apply *equally* to both sides, and that required the use of broader, more general language which, if a "club" was to be swung, would swing "equally on both sides." *Id.* at 55-56. Prior to the Act, rail employees had the *right* to ban together and to collectively withdraw from service to ob-

tain a bargaining proposal (29 U.S.C. § 52), but that would change the "conditions out of which the dispute arose" since, prior to the dispute, the employees "were employed." *Id.* at 56. The same "club" was intended to apply to the carrier, and, thus, even if management had a *right* to take an action, because, for example, the contract had expired, the Act's status quo obligation would prohibit the carrier from taking that action. *Id.* at 56.

When those concepts are applied to this case, it is clear that the actual, objective working conditions and practices which are in dispute in this case are the very jobs which the P&LE employees are performing, as well as their seniority and other contractual rights which have been accumulated over the years. *See, J.A.* at 88. Petitioner's proposed sale to Railco would obviously have *changed* those working conditions and practices in a way which had never occurred before, and indeed, would have effectively terminated jobs and the agreements. Whether that change would also *violate* any contractual right of the employees is immaterial. The crucial question is whether there is a *change* in those working conditions and "established practices;" if there is, then the Act prohibits it, for the Act's status quo obligation looks past the contractual rights of the parties and prevents either side from taking any action which might lead to an interruption of commerce until the Act's bargaining processes have been exhausted.<sup>26</sup> Depriving approximately

<sup>26</sup> The non-contractual basis of the Act's status quo obligation is apparent when the 1934 amendment to Section 5 First is contrasted with Section 2 Seventh which was also added in 1934. Section 2 Seventh speaks of "rates of pay, rules, or working conditions of its employees, *as a class as embodied in agreements*" (45 U.S.C. § 152 Seventh; emphasis added), whereas Section 5 First precludes changes in the "rates of pay, rules, or working conditions *or established practices* in effect prior to the time the dispute arose." 45 U.S.C. § 155 First (emphasis added). Section 5 First's amendment was added to "plug [the] . . . hole" which was found to exist in the 1926 Act between the status quo period of Section 6 and the

two-thirds of the P&LE employees of employment, and altering the rates of pay, rules and working conditions under which the remaining number would work, clearly would change existing working conditions, for one of the "fundamental" conditions out of which any dispute might arise "is the relationship of the parties . . . ." (S. Rpt. No. 615, 69th Cong., 1st Sess. at 5 (1920)). Such a change is, therefore, prohibited by the Act at this time.

Petitioner's and several of the *amici*'s arguments that the status quo includes all management rights which are not prohibited by an express—*i.e.*, written—or an implied agreement, was presented to this Court in the *Detroit & Toledo* case, and as respondent indicated above, was squarely rejected. Indeed, petitioner and several of the *amici*, including the United States and Air Con, are asking this Court to adopt Justice Harlan's *dissent*<sup>27</sup> that the status quo includes only those working conditions and practices about which "there is a basis for implying an understanding on the particular practice involved" 396 U.S. at 160 (Harlan, J., dissenting). That consensual test was rejected by this Court in 1969 as being too narrow.

creation of the Emergency Board under Section 10, which triggered the third status quo period. *See, Hearings on S. 3266, supra*, at 21 (Statement of J.B. Eastman). For an example of the need for the thirty (30) day "cooling-off" period in Section 5 First, *see*, Annual Report of the United States Board of Mediation for Fiscal Year Ended June 30, 1931 at 19-28.

<sup>27</sup> Air Con asserts that Justice Harlan's view of the Act's status quo obligation was a concurring view (Air Con Brief at 16); that is clearly incorrect, for Justice Harlan concurred with the majority in concluding that the status quo obligation may freeze "de facto conditions of employment" (396 U.S. at 159 (Harlan, J., concurring)), but "departed" from the majority by asserting that the freeze applied solely to those working conditions where "there is a basis for implying an understanding on the particular practice involved"—*i.e.*, "implied agreements." *Id.* at 159-60 (Harlan, J., dissenting).

In *Detroit & Toledo*, the railroad proposed establishing "outlying work assignments" for certain operating employees—*i.e.*, changing the location at which those employees reported for work—and the union responded by seeking to negotiate an agreement to cover the working conditions at that new reporting location. 396 U.S. at 144-45. While that dispute was pending before the NMB, the railroad decided to establish two new outlying assignments at a different location and subsequently withdrew its earlier proposal; the union, in turn, withdrew its Section 6 proposal and, instead, pressed a claim before an adjustment board that the outlying assignment was prohibited by the existing agreements. *Id.* at 145. The Special Board of Adjustment which heard the union's challenge ruled that: "There is nothing in the rules of agreement which preclude this carrier from establishing an outside assignment" (Appendix in Sup. Ct. No. 29, 1969 Term, at 110), and the carrier then decided to revive its original plans. The union responded by serving a new notice under Section 6 of the Act to revise the agreements to forbid the carrier from making any outlying assignments. 396 U.S. at 146. While the union's Section 6 proposal was pending, the carrier announced that it would implement its changes and the union threatened to strike; the carrier responded by seeking a strike injunction and the union countered by seeking a status quo injunction. *Id.*

In its briefs to this Court, the railroad argued that it had the right to implement the change during the Act's status quo period, because the status quo applied solely to agreements, either express or implied. *E.g.*, Reply Brief for Petitioner at 6, *Detroit & Toledo, supra*; Brief for Petitioner at 28-45, *id.* According to the *Detroit & Toledo*, since the union had never bargained for and obtained an agreement limiting its right to make outlying assignments, it should not be able to achieve that result merely by serving a Section 6 notice proposing

such a change. Brief for Petitioner at 41, *Detroit & Toledo*. To support its arguments, the railroad relied heavily upon *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942),<sup>28</sup> as does Air Con in this case. Air Con Brief at 16.

This Court rejected those arguments, for it concluded that even though the applicable collective bargaining relationship did not prohibit the Detroit & Toledo from making the outlying work assignment, the Act's status quo obligation did. As this Court explained (396 U.S. at 154; footnote omitted):

Here, . . . the dispute over the railroad's establishment of the [outlying] . . . assignments arose at a time when actual working conditions did not include such assignments. It was therefore incumbent upon the railroad by virtue of § 6 to refrain from making outlying assignments at Trenton or any other place in which there had previously been none, regardless of the fact that the railroad was not precluded from making these assignments under the existing agreement.

When the principles of that case are applied here, it becomes clear that appellant P&LE is simply wrong in

<sup>28</sup> Respondent RLEA respectfully submits that *Williams*, which involved essentially a question of whether Section 6 applied to "individual contracts of employment," was implicitly overruled by this Court's subsequent decisions in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944), and *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944), which, we submit, prohibit individual employment contracts negotiated in the face of the duty to bargain collectively. But as this Court noted in *Detroit & Toledo*, it did not have to "comment upon the present vitality of either of the[] grounds . . . [upon which *Williams* was decided, for] it is readily apparent that *Williams* involved only the question of whether the status quo requirement of § 6 applied at all." 396 U.S. at 158. As in *Detroit & Toledo*, this case involves the question not decided in *Williams*, but decided in *Detroit & Toledo*—i.e., what is the scope of the status quo obligation once it is triggered.

asserting that because the collective bargaining agreements do not prohibit it from selling its rail properties, it may do so, and do so in a manner which *changes* existing agreements affecting rates of pay, rules and working conditions, notwithstanding the fact that it has not complied with its bargaining obligations under the Railway Labor Act. Like the factual situation in *Detroit & Toledo*, the actual, objective working conditions in effect here do not include the changes which the P&LE is implicitly proposing and which are currently the subject of rail labor's negotiating efforts. Thus, even though the current agreements may not prohibit appellant from selling its rail properties, the Railway Labor Act's status quo requirement does prohibit the carrier from selling in a way that terminates the existing collective bargaining agreements and employment relationships.

Respondent RLEA respectfully submits that the *Detroit & Toledo* decision recognizes the important role which the Act's status quo requirement serves,<sup>29</sup> while at the same time it does not allow rail labor to create a right which it did not previously enjoy simply by serving a Section 6 proposal. If a *practice* has existed "for a suffi-

<sup>29</sup> As this Court explained in *Detroit & Toledo*, 396 U.S. at 150:

The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.

cient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions" (396 U.S. at 154), that conduct would not be barred by the service of a Section 6 notice. *E.g.*, *Baker v. UTU*, 455 F.2d 149, 157 (3rd Cir. 1971). Moreover, where an agreement *clearly* covers a particular situation, and there is no dispute over its application, serving a Section 6 notice to change that agreement does not prevent the carrier from acting pursuant to that agreement.<sup>30</sup>

However, when the carrier seeks to do something which it has never done before, or when circumstances have changed to such a degree that what was once a tolerable working condition because of the changed circumstances, has become intolerable, "it is absolutely essential that the status quo provisions of the Act apply to that working condition if the purpose of the Act is to be fulfilled." *Detroit & Toledo*, 396 U.S. at 155. As the Court explained (*id.*; footnote omitted):

If the railroad is free at this stage to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act's remedies work effectively.

This Court's decision in *Detroit & Toledo* is clearly the required interpretation of both the literal language and the intent of the Railway Labor Act's status quo obligation. If that Act is to continue to apply *equally* to both labor and management, it is essential that its status quo obligation prohibit both sides from altering the *actual, objective* working conditions and practices, *broadly conceived*, which were in effect when this dispute arose—

<sup>30</sup> See, *Rutland Ry. v. BLE*, 307 F.2d 21, 44 n.11 (2d Cir. 1962) (Marshall, J. dissenting).

*i.e.*, P&LE employees must continue to be able to work under their agreements.<sup>31</sup>

### III. THE ICC'S JURISDICTION OVER RAIL LINE SALES DOES NOT RELIEVE A RAIL CARRIER PARTICIPATING IN SUCH A SALE OF ITS OBLIGATIONS TO ITS EMPLOYEES UNDER THE RAILWAY LABOR ACT, FOR THAT LABOR STATUTE AND THE INTERSTATE COMMERCE ACT REGULATE ENTIRELY DIFFERENT AREAS OF CONDUCT

Petitioner, respondent ICC, and the *amici*, except for the United States, assert that the ICC's exclusive jurisdiction over rail line sales operates to override whatever obligations the Railway Labor Act might have otherwise imposed on the P&LE to bargain with its employees over the impact of the sale to Railco on their rates of pay, rules and working conditions. Respondent RLEA respect-

<sup>31</sup> The United States suggests that a remand is necessary to determine what the parties' respective rights are during the status quo period, and it adds that if there is a disagreement, that dispute would be a "minor" dispute subject to the exclusive jurisdiction of the adjustment boards. U.S. Brief at 26-27. Respondent RLEA disagrees with both assertions. First, there can be no question in this case, that this dispute arises from the P&LE's plan to sell its rail lines in such a manner that existing agreements will end. The jobs of the employees, their seniority rights, and their agreements, are clearly "conditions out of which the dispute arose," and thus, a sale without preserving the existing jobs, seniority, and agreements would change those actual, objective working conditions. This is exactly what the lower courts concluded, and, therefore, no remand is necessary.

A second problem with the Government's position is that any dispute over what constitutes the status quo is not a contractual dispute, for it is not the parties' agreements, but rather, the actual, objective manner in which they have acted which must be preserved, insofar as those conditions are related to or involved in the dispute. Consequently, the adjustment boards have no jurisdiction to decide those issues. *E.g.*, 45 U.S.C. § 153 First(i); *Transportation Communications Employees Union and Atlantic Coast Line R.R.*, 170 N.R.A.B. Dec. (Third Div.), 1, 13 (1968) (Referee Kenan).

fully submits that petitioner's, respondent ICC's, and their supporters' arguments are without merit, for the Railway Labor Act and the Interstate Commerce Act are not in conflict and can be read so as to give effect to each. Indeed, the two Acts are part of a harmonious, integrated scheme of regulation which Congress has crafted over the past century to ensure that this country enjoys uninterrupted, efficient rail service. Both Acts provide independent forms of regulation which, when viewed together, are *equally* important to the success of the overall regulatory scheme. Consequently, RLEA respectfully submits, neither Act overrides the other.

**A. Both Statutes Are An Exercise Of Congress' Exclusive And Plenary Power To Regulate Interstate Commerce Which, Together, Form An Integrated, Harmonious Regulatory Scheme**

Congress has long been aware that rail transportation is important to the economy and welfare of the nation, and for more than a century it has exercised its powers under Article I, Section 8, clause 3 of the Constitution of the United States to regulate commerce "among the several States" by regulating rail transportation. That regulation has taken many forms, including the Interstate Commerce Act which regulates transportation by, among other carriers, railroads (49 U.S.C. § 10501(d)), and the Railway Labor Act which regulates rail labor relations. Since both of those Acts are exercises of Congress' power to regulate interstate and foreign commerce, they are exclusive and plenary exercises of that power, preempting all inconsistent state laws. *Compare, UTU v. Long Island R.R.*, 455 U.S. 678, 682-83 (1982), *with, Chicago & North Western Transportation Co. v. Kal's Brick & Tile Co.*, 450 U.S. 311, 318 (1981).

However, contrary to petitioner P&LE's and the ICC's position, the transportation statute does not supersede the labor statute, for as respondent shows below, there is

no irreconcilable conflict between the two statutes. *See, Watt v. Alaska*, 451 U.S. 259, 267 (1981); *see also, United States v. Fausto*, Sup. Ct. No. 86-595, decided January 25, 1988 at 13-14. The only conflict to which the P&LE and ICC can point is one of their own making, for they believe that the ICC is a labor board, with the power to resolve labor disputes. That, belief, however, is erroneous, for the Commission was not "designed or intended [by Congress] to serve as a repository for labor disputes." S. Rpt. No. 459, 88th Cong., 1st Sess. at 9 (1963).

When the histories of both Acts are examined, it becomes clear that Congress has viewed the two statutes as regulating different, albeit related, forms of conduct. This fact is evident throughout almost a century of side-by-side regulation, where Congress has essentially kept the ICC divorced from *resolving labor disputes*.<sup>32</sup> Moreover, Congress has considered both forms of regulation to be essential to its primary goal of providing an efficient rail transportation system.

When the railroads were being returned to private control after the first World War, Congress considered widely varying plans to restructure its overall rail regulation (*see, THE RAILROAD LABOR BOARD* at 77, 83), and eventually enacted the Transportation Act of 1920, *supra*. That Act substantially modified the Interstate

<sup>32</sup> Perhaps the reason for the Commission's recent foray into labor relations regulation is its mistaken belief that the "ICA has more indicia consonant with a labor statute than the RLA." ICC Brief at 31 n.22. That statement shows conclusively the fact that the ICC lacks any expertise in this area of regulation, for the ICC fails to appreciate the difference between employee welfare—*i.e.*, "minimum standards"—and labor relations—*i.e.*, "collective bargaining"—legislation. *E.g., Fort Halifax Packing Co. v. Coyne*, 482 U.S. —, 107 S.Ct. 2211, 2222 (1987); *Terminal Railroad Assoc. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6 (1943).

Commerce Act to regulate for the first time rail sales, abandonments, extensions and consolidations, among other matters. 41 Stat. at 474. That bill also built upon almost four decades of legislation dealing with rail labor disputes, and created the Railroad Labor Board which was to hear and, "with due diligence," *decide* in a non-enforceable manner, rail labor disputes. Transportation Act of 1920, § 307(a), 41 Stat. at 470; *Pennsylvania Railroad System v. Pennsylvania R.R.*, *supra*.

For a variety of reasons, the Labor Board proved ineffective at preventing threatened interruptions to rail commerce. L.K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 576 (1937); THE RAILROAD LABOR BOARD at 386-93. Rail labor then drafted a bill which drew upon the lessons of past decades and devised a statutory scheme to prevent interruptions to commerce, not by legislating a settlement to disputes, but rather, by providing for effective collective bargaining to enable the parties to devise their own settlements. THE RAILROAD LABOR BOARD at 407-14. As shown above, that dispute resolution process became the Railway Labor Act of 1926, which, with but a few modifications, remains as the governing labor law for the rail industry.

At the same time that Congress was regulating rail labor relations, it was also regulating rail *economic* matters, first with respect to rates (Act of February 4, 1887, ch. 104, 24 Stat. 379) and then gradually with respect to rail corporate decisions. *E.g.*, Title IV of Transportation Act of 1920, *supra*. That regulation became more extensive with each subsequent legislative initiative (*e.g.*, Transportation Act of 1940, ch. 722, 54 Stat. 898), until finally Congress reversed that trend and began to "deregulate" with the enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 [hereinafter, "4R Act"], Pub. L. No. 94-210, 90 Stat. 31.

That trend culminated in the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895.

Petitioner and the ICC are quite correct in observing that Congress, since 1920, has given the interests of employees careful consideration whenever it made extensive revisions to the Interstate Commerce Act. But what petitioner, the ICC and their supporters fail to appreciate is that Congress has not given the ICC the authority to regulate or, as relevant here, to *deregulate rail labor relations*—*i.e.*, the collective bargaining process. Rather, Congress, the ICC,<sup>33</sup> and this Court,<sup>34</sup> have recognized that the "just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national [transportation] policy . . . , has [a] . . . bearing on the successful prosecution of that policy and [a] . . . relationship to the maintenance of an adequate and efficient transportation system." *United States v. Lowden*, *supra* note 34, 308 U.S. at 234. Indeed, as this Court added in *Lowden*, 308 U.S. at 235-36:

The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

Thus, in order to ensure that the *public interest* in efficient and reliable rail transportation is not frustrated due to the failure of a carrier to provide for the fair and equitable treatment of all of its employees, both represented and non-represented, Congress has mandated

<sup>33</sup> See, *St. Paul Bridge v. Terminal Ry.—Control*, 199 I.C.C. 588, 595 (1934).

<sup>34</sup> *United States v. Lowden*, 308 U.S. 225 (1939).

that the ICC consider the interests of employees as an essential part of that public interest. 49 U.S.C. § 10101a (12), 11344(b)(1)(D). Moreover, Congress has both authorized and, in some cases, mandated that the Commission impose a fair arrangement to protect the interests of employees who may be affected by corporate restructurings. *E.g.*, 49 U.S.C. §§ 10901(c)(1)(A)(ii), 10903(b)(2), and 11347.

This form of legislation, establishing minimum public interest standards, stands in stark contrast with the Railway Labor Act which, although it has a common goal of preventing interruptions to commerce, does not concern itself with the equities of the solution reached through collective bargaining. As this Court explained in *Terminal Railroad Assoc. v. Brotherhood of Railroad Trainmen*, *supra* note 32, 318 U.S. at 6 (footnote omitted):

The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions as such. . . . So far as the Act itself is concerned, these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. - The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. . . .

There is, of course, a fundamental relationship between the two forms of legislation—minimum standards legislation and collective bargaining legislation—for Congress in the minimum standards legislation has established the “floor” with which all carriers must comply; such legislation does not establish a “ceiling” above which the parties may not bargain. Moreover, that legislation establishes the fact that this subject matter covered by the minimum standards legislation is *bargainable*. As this Court ob-

served in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, *supra*, 362 U.S. at 336-38, the scope of bargaining in the rail industry over corporate restructuring decisions which effect employees is inextricably entwined with Congress’ legislation establishing minimum public interest standards. Indeed, respondent RLEA respectfully submits, each form of regulation has had an important impact on the other. Moreover, when this relationship is examined, it is clear that Congress has devised its minimum standards legislation to *supplement*, not *supersede*, the labor statute, for Congress and the ICC have relied upon the collective bargaining process to *implement* those minimum standards.

This complimentary relationship between the two forms of regulation existed virtually from the passage of the first bill fixing minimum standards—the ERTA in 1933. Congress, as explained above at pages 33-35, incorporated into Section 7 of that Act, the notice, bargaining and status quo features of the Railway Labor Act (*see*, 48 Stat. at 213-14), and also included both a freeze on employment levels and monetary protections for adversely affected employees. ERTA, § 7(b), (d), 40 Stat. at 214. When the authority conferred by that legislation on the Federal Coordinator was about to expire, rail labor negotiated with most carriers the Washington Job Protection Agreement of 1936. *See, Order of Railroad Telegraphers*, 362 U.S. at 337-38; 2 *Hearings on Omnibus Transportation Bill: Before House Committee on Interstate and Foreign Commerce*, 76th Cong., 1st Sess. at 1720-22 (1939) (Statement of Joseph B. Eastman). That agreement, which is still in effect and became the model for subsequent protective arrangements in this industry (*see, New York Dock Ry. v. United States*, *supra*, 609 F.2d at 86-90), was clearly built upon the principle that the labor statute’s notice, bargaining and status quo obligations applied to the corporate transactions which were the subject of that agreement—*i.e.*, “coordinations—and,

in Sections 4 and 5 of that Agreement,<sup>35</sup> modified those statutory requirements for coordinations by agreeing to the compulsory arbitration of disputes over the "selection and assignment of forces." That arbitration agreement was not open-ended, however, for labor made it clear during the bargaining process for the agreement that "no change in seniority rules or practices on the roads can be brought about by this agreement; that the management and the committees on the roads are the only parties who can modify the schedules [i.e., agreements on rules and working conditions]." Appendix C at 21a.

That collective bargaining agreement became the minimum standard, first as imposed by the ICC in the exercise of its discretion (see, *United States v. Lowden*, *supra*), and then as required by the Congress in the Transportation Act of 1940 to be imposed in all consolidation cases. 54 Stat. at 906-07. When the Commission failed to adequately implement the 1940 Act, rail labor first enforced the Interstate Commerce Act (e.g., *RLEA v. United States*, 339 U.S. 142 (1950)) and then began to negotiate new arrangements which applied more appropriately to the changing times. E.g., *Pennsylvania R.R. Co.—Merger—New York Central R.R. Co.*, 347 I.C.C. 536, 538-39 (1974), *Seaboard Coast Line R.R. Co.—Merger—Piedmont & Northern Ry. Co.*, 334 I.C.C. 378, 384-86 (1969); *Duluth, South Shore & A.R.R.—Merger*, 312 I.C.C. 341, 356-57 (1960); and *Norfolk & Western Ry. Co.—Merger*, 307 I.C.C. 401, 439-40 (1959).

Those new arrangements, as did the Washington Agreement, followed the Railway Labor Act's status quo

<sup>35</sup> A certified copy of that Agreement was lodged with the appellate court during its consideration of No. 87-1888, and respondent has reproduced Sections 4 and 5 of that Agreement as Appendix C to this brief. Respondent has also included as part of Appendix C excerpts of the Journal of Proceedings which the carriers' representatives made of those negotiations; a full copy of that Journal will be lodged with the Clerk of this Court. Those excerpts show that it was *not* the intent of Sections 4 and 5 and any arbitration under Section 13, to alter existing agreements.

provisions and preserved existing rates of pay, rules, and working conditions; they, however, expanded on the Washington Agreement by giving the employees life-time job guarantees in return for allowing the carrier to alter the status quo by moving work from one carrier to the other. E.g., *Penn Central—Merger*, *supra*, 347 I.C.C. at 538-39.

When the ICC failed to adjust its protective arrangements to reflect the advances in the industry, rail labor returned to Congress and when Congress enacted the 4R Act, it required the Commission to increase the levels of protection which it routinely imposed on corporate restructurings. E.g., *Hearings on Railroads, Before Subcommittee on Surface Transportation of Senate Committee on Commerce*, 94th Cong., 1st Sess. at 1105-07 (1975) (Statement of William G. Mahoney); H. Rpt. No. 94-725, 94th Cong., 1st Sess. at 76 (1975) ("If we are to have a fair rationalization of the rail system in the United States, then adequate protection of jobs must be afforded those who choose a career in railroad jobs"). Consequently, it is simply erroneous for petitioner and the ICC to state that, for the past fifty (50) years, rail labor has looked exclusively to the ICC to protect the interests of employees. E.g., P&LE Brief at 37.

As a result of the complimentary nature of the Railway Labor Act and the ICC's minimum standards responsibilities, rail restructurings, until 1983, developed in this industry on the concept that the established rates of pay, rules and working conditions must be preserved by the carriers when they effectuate a corporate restructuring.<sup>36</sup> This is entirely consistent with both the transportation statute and the labor statute, for so long as the carrier does not *change* existing, collectively established, rates of

<sup>36</sup> See generally, *Republic Airlines, Inc.*, 8 N.M.B. No. 49, 54 (1980) ("[A] long history of mergers and acquisitions has resulted in numerous [parent-subsidiary and brother-sister] . . . relationship[s]. Even in merger cases, railroads have continued to operate as separate carriers"); and Resp. App. C at 20a-21a.

pay, rules and working conditions, the Railway Labor Act *does not* interfere with the corporate restructuring.

This relationship between the two Acts was codified by Congress when in 1976 it amended what is now Section 11347 to require the ICC to adopt a protective arrangement that is "at least as protective of the interests of employees who are affected by the transaction [being approved by the Commission] as the . . . terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. § 565)",<sup>37</sup> Congress has required the Commission to adopt protective "terms" which provide "for (1) the preservation of rights, privileges, and benefits . . . to [affected] . . . employees under existing collective-bargaining agreements or otherwise; [and] (2) the continuation of collective-bargaining rights . . . ." 45 U.S.C. § 565(b)(1) and (2). If collective bargaining agreements and rights are to be preserved by all ICC orders to which those mandatory protections are imposed, it is impossible to assert that there is a conflict between the ICC's order and the Railway Labor Act which would justify the overriding of one of the two statutes.

Petitioner and the ICC ignore this integral relationship between the Railway Labor Act and the minimum standards features of the transportation statute, and instead argue that Congress has given the ICC exclusive jurisdiction over *all* aspects of rail line sales, including labor relations matters. Those arguments, however, do not withstand even a cursory scrutiny, for Congress has long recognized that rail labor should have a right to devise its own solutions to the impact of ICC regulated transactions on employees. This, however, does not remove the ICC from the picture, for the ICC always retains the right to review that negotiated solution to determine if it renders the transaction inconsistent with

<sup>37</sup> 49 U.S.C. § 11347, added by Section 402(a) of the 4R Act, 90 Stat. at 62.

the public interest. *Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37 (1971). Indeed this relationship between the two Acts began in 1926, and has not been changed by Congress since that time.

When the proposed Railway Labor Act was being considered in 1926, its opponents in Congress attempted to add an amendment which would have given the ICC the power to suspend any wage agreement which, in the Commission's "opinion," would have involved "an increase in wages or salaries as not to be in the public interest." 1 HISTORY OF THE RAILWAY LABOR ACT OF 1926 at 89 (ABA 1988). That proposed amendment went on to provide that the ICC should thereafter determine whether the agreement should be allowed. *Id.* at 89-90. That amendment was rejected by the committees considering the proposed legislation, for as the Senate Committee on Interstate Commerce explained:

[T]here is an objection, which the committee deems conclusive, to giving the Interstate Commerce Commission jurisdiction over agreements as to wages. That, in the committee's opinion, would involve the commission in a field of fierce controversy, which might, and probably would, impair its usefulness.

Undoubtedly, under section 15a of the interstate commerce act, the Interstate Commerce Commission has jurisdiction, in fixing rates, to examine into the carriers' expenditures of all sorts, and not to increase rates to provide for extravagant expenditures, whether for labor or for any other purpose.

S. Rpt. No. 606, 69th Cong., 1st Sess. at 5-6 (1926). That amendment was offered in both Houses while the bill was being debated, and it was again rejected. *See*, 1 HISTORY OF THE RAILWAY LABOR ACT, *supra*, at 468, 475, 505-12.

This relationship between the two Acts was further emphasized and, RLEA submits, conclusively established, when Congress amended the Interstate Commerce Act in

1940 to provide that the fair and equitable arrangement which it was requiring to be imposed in all consolidation cases, could be established by collective bargaining; as Congress provided: "Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representatives of its or their employees." 54 Stat. at 907, adding 49 U.S.C. § 5(2) (f) (since recodified as 49 U.S.C. § 11347). That provision is still a part of the Interstate Commerce Act today.

Petitioner attempts to escape the force of that statutory provision by ignoring it, and by asserting erroneously that Congress rejected a proposal by Commissioner Eastman that the question of the protection of employees be left to collective bargaining. P&LE Brief at 41-42. Petitioner's arguments are frivolous, for the legislative history of the 1940 Act's employee protection feature, including the sentence quoted above, shows that Congress intended that language to mean exactly what it says: *Notwithstanding* any provision of the Interstate Commerce Act, rail labor may require the carrier to negotiate for a protective arrangement which rail labor considers to be fair and equitable.

As initially proposed by Commissioner Eastman,<sup>38</sup> the bill which became the Transportation Act of 1940 did not contain a mandatory employee protection provision, because, as Commissioner Eastman explained:

Now, when we were drafting the bill to create the Transportation Authority we thought that in view of what the President had said and what the parties had done in response thereto [*i.e.*, negotiate the Washington Job Protection Agreement of 1936], that it had been agreed by those directly concerned that protection of the employees was a matter that

<sup>38</sup> See, note 25, *supra*.

could be handled better by negotiation and agreement than by legislation, and that an agreement had been reached which would protect employees.

That was the reason why no provision was made in that bill for such protection. However, so far as the Commission is concerned, if it is thought that the handling of that matter through negotiation and agreement will not fully cover the situation and that legislation is desirable, we have no objections whatever to provisions in the bill which will require employee protection.

2 *Hearings on Omnibus Transportation Bill, supra*, at 1722 (Testimony of Joseph B. Eastman) (emphasis added). Earlier, George M. Harrison, the Chairman of RLEA and a member of the "Committee of Six" which had been appointed by President Roosevelt to study the rail crises, testified that rail labor was advocating what is now Section 11347 to supplement, *not supersede*, negotiations; as Mr. Harrison testified:

Well, you might very properly ask the question, If we have such an agreement [*i.e.*, Washington Job Protection Agreement of 1936] why [do] we want to put anything in the law? Well, the reason for it is that about 15 per cent of the mileage of the country refuses to come into the agreement. You always have the willful minority that will not go along with the general good and so you have got to make those people do what is right, assuming that what has been done is right, and so we propose that this Transportation Board be given the authority to impose and require protection for men who are adversely affected when these changes are made.

1 *Hearings on Omnibus Bill, supra*, Vol. 1 at 216-17 testimony of George M. Harrison).

That Congress intended ICC-imposed employee protections to be the minimum levels of protection to be avail-

able to employees, and did not intend to supersede rail labor's right to negotiate different protections, should be beyond dispute, for when Representative Lea, one of the Act's managers, explained the result of the Conference at which the Harrington Amendment was modified (*see*, P&LE Br. at 38), Mr. Lea stated that:

The substitute that we bring in here provides two additional things. First, there is a limitation on the operation of the Harrington amendment for 4 years from the effective date of the order of the Commission approving the consolidation. In other words, the employees have the protection against unemployment for 4 years, but the Commission is not required to give them benefits for any longer period. *If the employees themselves make an agreement with the railroad company for a better or a longer period, that is a matter between the railroad men and the railroads, but this 4-year limitation is established by the pending conference agreement.*

86 Cong. Rec. 10178 (August 12, 1940) (Remarks of Rep. Lea) (emphasis added). Representative Lea then concluded (*id.*; emphasis added):

We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. *We take nothing from labor by this agreement.* We simply write specific provisions that shall be in the order of approval of the Commission, but otherwise we do not tie its hands.

Congress, therefore, clearly intended that the labor statute and the transportation act would complement each other, with rail labor being able to choose whether it would negotiate the protective arrangement, or rely upon the ICC to impose that arrangement. Moreover, until recently, this is the way the ICC itself viewed re-

lationship between the two Acts. *E.g., Southern Ry.—Control*, 331 I.C.C. 151, 169-70 (1967).<sup>39</sup>

Although Congress has recently modified the Interstate Commerce Act to decrease its economic regulation, it has not decreased the minimum standards features of that Act, and, in fact, it has expressly *protected* those features by prohibiting the ICC from using its exemption powers "to relieve a carrier of its obligation to protect the interests of employees as required by the subtitle." 49 U.S.C. § 10505(g)(2). Consequently, it is simply contrary to the plain language of the Acts and to their established relationship to now argue, as the P&LE and the ICC do, that Congress has somehow authorized the ICC to relieve a rail carrier of its labor relations obligations.

<sup>39</sup> In *Southern Ry.—Control*, 331 I.C.C. at 169-70 (emphasis in original), the Commission stated that:

[U]nder section 5(2)(f) [now, § 11347], we impose formulae of protective conditions upon the carriers seeking specific permissive authority under section 5(2) of the act [now, §§ 11343, *et seq.*], the purpose being to protect the interests of employees some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act. Rights obtained by employees under section 5(2)(f) are the minimum protection which an applicant carrier must provide in order to obtain this Commission's approval of its transaction. They are not, however, the maximum rights employees may gain . . . . The rights of railroad employees under their collective bargaining agreements, under the Washington Agreement, and under the protective conditions imposed upon the carriers under section 5(2)(f) are independent, separate, and distinct rights. We have historically recognized the independent nature of those rights and have distinguished the employee rights derived from collective bargaining agreements from those derived from conditions which we have imposed upon carriers. The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees.

**B. Both Statutes Can Be Read So As To Give Effect to Each While Preserving Their Sense And Purpose**

To support their assertion that the ICC's jurisdiction over rail line sales operates to relieve the P&LE of its obligations under the Railway Labor Act to bargain and to maintain the status quo, petitioner and the Commission advance essentially three interrelated justifications. First, and primarily, they assert that Congress intended to give the ICC exclusive jurisdiction over rail labor disputes which may arise from corporate transactions within that agency's economic regulation jurisdiction. Second, they assert that unless the Commission is given such an expansive, all-encompassing jurisdiction, rail labor will be able to frustrate the implementation of the ICC's transportation policy as developed in *Ex Parte 392*. And finally, they argue that their position as to the supremacy of the ICC's powers over rail labor relations has been upheld by a long line of appellate court decisions involving both the Commission and the former Civil Aeronautics Board [hereinafter, "CAB"].

Respondent RLEA respectfully submits that petitioner's and the ICC's supremacy argument is without merit, for they are wrong in asserting that the ICC is a labor board. As respondent has shown above, Congress has given the Commission the responsibility to impose, in certain corporate restructurings, *minimum* levels of benefits for the protection of rail employees who may be affected by those corporate actions. But Congress in the past has expressly refused to give the ICC the power to involve itself in the collective bargaining process as a mediator or as an arbiter of the merits of a bargaining dispute. *E.g.*, S. Rpt. No. 459, 88th Cong., 1st Sess. at 9 (1963).<sup>40</sup> S. Rpt.

<sup>40</sup> In that report, the Senate rejected using the ICC as the body to investigate and report on a long-time "crew consist" dispute by stating (S. Rpt. No. 459 at 9):

[N]either the Interstate Commerce Commission or the other regulatory agencies other than the National Labor Relations

No. 606, 69th Cong., 1st Sess., at 5-6 (1926). Petitioner, the ICC and the *amici* can point to no specific congressional grant of authority which alters the truth of Commissioner Eastman's statement in 1934 that his fellow Commissioners "have no jurisdiction over labor matters at all and never have had." *Hearings on H.R. 7650, Before House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. at 54 (1934)* (Statement of Joseph B. Eastman).

Petitioner's argument that the minimum standards legislation operates as the sole level of protection which Congress intended to be made available for employees (P&LE Brief at 47), falls apart when examined closely. First, in those provisions of the Act where Congress has mandated that the Commission impose employee protections, Congress, through what is now the second sentence of Section 11347, has authorized rail labor to demand that the carrier negotiate. But second, and more important, petitioner's argument, if correct, would mean that Congress has enacted a form of *compulsory* dispute resolution where the carrier proposes the resolution in its application to the ICC, and is given the unreviewable freedom to accept or to reject the Commission's decision. *See, Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151, 158 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). Rail labor's only course of appeal in such a situation would be a petition to an appellate court for review of that decision on an abuse of discretion standard. Such an uneven dispute resolution procedure is contrary to Congress' entire regulation of rail labor relations. *Texas & New Orleans, supra*, 307 F.2d at 157-58.

Board, which are, in fact, arms of Congress, are designed or intended to serve as a repository for labor disputes. This Committee has no desire to see a change made in this respect."

In 1926, when Congress was faced with the choice of either making the decisions of the Railroad Labor Board enforceable or establishing a procedure for the negotiation, mediation and *purely voluntary arbitration* of disputes, it chose the latter. S. Rpt. No. 606, *supra*, at 3-4; *Hearings on H.R. 7650, supra*, at 16 (Statement of Joseph B. Eastman). With respect to disputes concerning *changes*, Congress has not deviated from that choice, except on certain, very limited occasions. *E.g.*, Pub. L. No. 99-431, 100 Stat. 987 (1986). However, each time that Congress has imposed a resolution of a collective bargaining dispute, it has done so only after the collective bargaining process had been fully utilized, but the dispute remained unresolved.<sup>41</sup> Against this background of an almost absolute ban on the compulsory resolution of rail labor disputes involving changes (*see*, 45 U.S.C. § 157 First), it is inconceivable that Congress, without the knowledge of rail labor which has been intimately involved in each major revision to the Interstate Commerce Act (P&LE Brief at 40-43), would have enacted a form of compulsory dispute resolution, especially one as one-sided as the P&LE and the railroads maintain exists today in the Interstate Commerce Act.

Besides being inconceivable, petitioner's argument that the ICC's orders in this case have relieved it of its Railway Labor Act obligations, is also contrary to the well-settled rule of statutory construction that "repeals by implication are not favored" (*Rodriguez v. United States*, 480 U.S. 522, 524 (1987)), and will not be found to exist "unless an intent to repeal is 'clear and manifest.'" *Id.* at 524, *quoting* prior cases. Moreover, federal courts "must read the statutes to give effect to each if we can do so while preserving their sense and pur-

<sup>41</sup> *E.g.*, Pub. L. No. 88-108, 77 Stat. 132 (1963); Pub. L. No. 90-54, 81 Stat. 122 (1967); Pub. L. No. 91-225, 84 Stat. 130 (1970); Pub. L. No. 97-262, 96 Stat. 1130 (1982).

pose." *Watt v. Alaska, supra*, 451 U.S. at 267. In other words, one federal statute will not be viewed as overriding another *unless* such an intent is "clear and manifest" or there is an "irreconcilable conflict" between the two.<sup>42</sup> Neither justification exists here to conclude as the P&LE and ICC have, that the ICC's jurisdiction over rail line sales supersedes the Railway Labor Act.

As we have shown above, there is no "irreconcilable conflict" between the two statutes; indeed, the two are integral parts of an overall regulatory scheme to provide safe, efficient and uninterrupted rail service. The Interstate Commerce Act addresses the economic aspects of a proposed corporate restructuring, while the labor statute addresses the labor relations aspects. While there is an overlap between the two, that overlap is in the form of one statute—the transportation statute—providing the minimum standards that will be imposed *unless* the labor statute achieves a different, more beneficial, result.

Complimentary statutes of this sort are common in the field of labor relations governed by the NLRA (*e.g.*, *Fort Halifax Packing Co. v. Coyne, supra*, 107 S.Ct. at 2222-23), although the minimum standard legislation is frequently state legislation. Since that state legislation is enforceable, even in the face of a supremacy argument (*id.*), unless there is a clear congressional intent to the contrary, it is clear that the two forms of legislation are

<sup>42</sup> *United States v. Fausto, supra*, does not justify a different analysis here, for petitioner and its supporters are attempting to use a discretionary authority in the transportation statute to override the *express statutory text* of the Railway Labor Act that the P&LE must "exert every reasonable effort" to settle all disputes, and that until that bargaining is completed it may not change the "conditions out of which the dispute arose." *Fausto* actually precludes petitioner's argument, for as this Court noted in that case, where express statutory language is involved, "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change." Slip op. at 13.

viewed by this Court and by Congress as being complementary, and not in conflict.

In this case there is no "clear and manifest" expression of congressional intent to have the transportation statute override the labor statute, and all of the judicial decisions to which petitioner refers to support its argument involved 49 U.S.C. § 11341(a),<sup>43</sup> or a comparable statute,<sup>44</sup> which specifically provides that any carrier participating in "a transaction approved by or exempted by the Commission under this subchapter [i.e., §§ 11341 to 11351]" is "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction" as approved and conditioned by the ICC. That specific immunity provision does not apply here, because this case *does not involve* a corporate transaction either approved or exempted by the ICC under subchapter III or Chapter 113. Rather, this case involves a rail exemption under 49 U.S.C. § 10505 to which, the ICC has acknowledged in non-labor cases, Section 11341(a)'s immunity does not apply, even where, but for the rail exemption, the transaction would have been subject to the ICC's approval under Section 11344 of the Act, 49 U.S.C. § 11344. *Ex Parte No. 282 (Sub-No. 9), Railroad Con-*

<sup>43</sup> Neither of the pre-1976 ICC-related cases upon which petitioner relies (P&LE Brief at 50 n.31) involved an actual conflict between the labor and transportation statutes, and in fact, involved *agreements* which were adopted by the ICC as the protective conditions.

<sup>44</sup> Section 414 of the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, 770, until its modification in 1978 by the Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705, as did its predecessor Section 414 of the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, provided an immunity from all restraining and prohibitory laws in so far as necessary to carry out a CAB merger or control approval. Thus, even though not specifically addressed in the appellate court decisions, Section 414 provided a manifestation of congressional intent on the conflict issue in the CAB order cases.

*solidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270, 279 (1985).<sup>45</sup>

In essence, petitioner's, the ICC's, and the *amici's* arguments reduce themselves to essentially one cry: Enforcement of the Railway Labor Act frustrates the ICC's decision in *Ex Parte 392*. That argument, however, is without merit, for the only way in which the decisions below can be viewed as being in *conflict* with *Ex Parte 392*, is if *Ex Parte 392* is viewed as relieving the selling rail

<sup>45</sup> *Amicus* Guilford Transportation relies on Section 11341(a) to distinguish its case from the one at bar, but there are two problems with that reliance. First, while Section 11341(a) does refer to exemptions approved under the consolidation subchapter of the statute, that language does not refer to rail exemptions. Rather, it was added by the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102, 1122, at the same time Congress added an exemption provision to Section 11343 for motor carriers, but not rail carriers. *See*, 49 U.S.C. § 11343(e). As Congress made clear in the reports accompanying that legislation, those amendments were not intended to affect the ICC's authority over rail exemptions. H. Rpt. No. 97-780, 97th Cong., 2d Sess. at 56 (1982).

A second problem with Guilford's argument is that even if Section 11341(a) were applicable, it would only immunize Guilford from complying with the labor statute. Section 11341(a) relieves a carrier of restraining or prohibitory laws, but only to the extent necessary to carry out the ICC's order, as conditioned by Section 11347. Since Section 11347 has, from its amendment in 1976, specifically required that the carrier "preserve" rates of pay, rules, and working conditions until changed in accordance with the labor statute (*see, New York Dock Ry.—Control*, 360 I.C.C. 61, 84, *aff'd, New York Dock Ry. v. United States, supra*), there can be no conflict between the two statutes. Indeed, as we have shown above, since a carrier can sell, merge or otherwise consolidate without violating the labor statute's status quo provision so long as it preserved existing agreements, there can be no irreconcilable conflict between the two statutes. In fact, up until the time that the ICC in 1983 arrogated unto itself the power of a labor board, no ICC approved transaction was ever frustrated by the labor statute. *See, Chicago, St. Paul, Minn. & Omaha Ry.—Lease*, 295 I.C.C. 696, 701-02 (1958).

carrier of its obligations under the labor statute. But as we have shown above, Congress has not given the ICC that authority, and thus, *Ex Parte 392* cannot be read as accomplishing that result. Petitioner P&LE has not been enjoined from selling its railroad operations; rather, it has been enjoined from selling in such a way that the actual, objective working conditions and practices of its employees are changed during the bargaining process.

At the crux of petitioner's and the *amici's* objections to the decisions below is their belief that enforcement of the Railway Labor Act jeopardizes the *economics* of sales such as the one to Railco, and this, they assert, is contrary to the short line sales policy adopted by the ICC. That argument is meritless. The ICC's short line policy has been so popular because it has been viewed as a way of reducing labor costs. See, *RLEA v. ICC*, 784 F.2d 959, 974 n.17 (9th Cir. 1986); *Hearing on Short Line and Regional Railroads Before Subcommittee on Surface Transportation of Senate Committee on Commerce*, 99th Cong., 2d Sess. at 17 (1986) (Statement of Heather J. Gradison). Moreover, that policy is not one which has been designed by Congress, but, as ICC Chairman Heather J. Gradison has explained, was a "surprise," and "unexpected gain out of deregulation." *Hearings on Rapid Growth of Short Lines, Before Subcomm. on Transportation of House Committee on Energy and Commerce*, 100th Cong., 1st Sess. at 69 (1987) (Statement of H.J. Bradison); *Oversight Hearings on Staggers Rail Act, Before Subcomm. on Transportation of House Committee on Energy and Commerce*, 100th Cong., 1st Sess. at 425 (1987) (Statement of H.J. Gradison). Whenever Congress has designed such a program, it has dealt with the employees impact. (See, 49 U.S.C. § 10910. Here, however, the ICC has assumed erroneously that it can override the labor statute's regulation of interstate commerce, and it is that error which has resulted in the P&LE's erroneous claim that there is a conflict between the two statutes.

#### IV. THE STATUS QUO INJUNCTION WAS NOT A COLLATERAL ATTACK ON THE ICC EXEMPTION ORDER, FOR THAT INJUNCTION DOES NOT ENJOIN, SUSPEND OR ANNUL THE EXEMPTION

Petitioner and *amicus* Chicago & North Western Transportation Company argue that the status quo injunction upheld by the Third Circuit is a collateral attack on the Commission's orders because the practical effect of that injunction was to kill the sale to Railco. Those arguments, however, are without merit, for petitioner and the North Western fail to appreciate the fact that the ICC exemption order did not *authorize* the sale, but merely relieved Railco of the need to obtain prior ICC approval before it acquired and operated the P&LE's rail lines. 49 U.S.C. § 10505. Moreover, Railco was not precluded from buying the P&LE's assets, nor was the P&LE enjoined from selling. J.A. at 213.

28 U.S.C. § 2321(a), the statutory provision upon which the P&LE relies to sustain its collateral attack argument, provides in pertinent part that: "Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a[n] . . . order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in" 28 U.S.C. § 2341, *et seq.* That provision, however, is not applicable to this case, for RLEA has not asked the lower courts to enjoin, suspend or in any way set aside the exemption order which the ICC had previously issued under 49 U.S.C. § 10505. That order, *i.e.*, *Ex Parte 392*, as exercised by Railco's September 19, 1987 Verified Notice of Exemption, simply *relieved* Railco from the need to seek the prior approval of the Commission under 49 U.S.C. § 10901 before it acquired or operated the P&LE rail lines. *Ex Parte 392*, 1 I.C.C. 2d at 817-18; 49 U.S.C. § 10505(a). While the injunction in this case prohibited the P&LE from selling to Railco in the manner in which it initially proposed,

that injunction clearly did not prohibit the P&LE, or inferentially Railco, from utilizing that exemption if the P&LE was sold in a manner which complied with the Railway Labor Act.

Petitioner seeks to avoid the plain meaning of the language used by Congress in 28 U.S.C. § 2321(a) by asserting that since the effect of the injunction was to void the sale, the injunction must be viewed as enjoining or suspending the ICC's exemption. Petitioner's sole support for that assertion is *Venner v. Michigan Central R.R.*, 271 U.S. 127 (1926), and it is misplaced. While *Venner* observed that a "permissive" ICC order was subject to review (271 U.S. at 131), that principle does not allow a railroad to transform an order exempting—i.e., relieving—Railco from complying with the prior approval requirements of 49 U.S.C. § 10901, into an order authorizing the P&LE to violate the Railway Labor Act. Since the ICC order at issue (i.e., *Ex Parte* 392) did not purport to relieve P&LE of its Railway Labor Act obligations, that order is not a bar to a suit to enforce that labor statute. *Central New England Ry. v. Boston & Albany R.R.*, 279 U.S. 415, 418-19 (1929); *Northeast Wisconsin R.R.—Transportation Comm.—Exemption*, ICC Finance Docket No. 30760, served December 22, 1986 at 4.

An additional defect with petitioner's argument is that the ICC's exemption order cannot be viewed as addressing the P&LE's obligations under the Railway Labor Act and thus, the federal court called upon to enforce that labor statute cannot be viewed as lacking jurisdiction to consider the impact of that exemption on the P&LE's obligations under that labor statute. It is well settled that even where a specific immunity provision such as Section 11341(a) applies to the Commission's order, that agency does not have jurisdiction to enforce the "other laws" to which the statute's immunity applies. *McLean*

*Trucking Co. v. United States*, 321 U.S. 67, 79-88 (1944). Instead, the agency's task is to construe and to comply with its own statute, for that "legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its actions." *Id.* 321 U.S. at 80. Once the ICC has acted and told the applicant for its order what it can do (e.g., *Chicago, St. Paul, Minn. & Omaha Ry.—Lease*, *supra* note 45, 295 I.C.C. at 702), it then is the responsibility of the tribunal called upon to enforce that "other law" to determine if it is enforceable in light of the agency's order. *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 122-23 (1948); *see, ICC v. BLE*, 482 U.S. —, slip op. at 14 n.13 (1987) (Stevens, J., concurring). In determining whether to enforce that other law, however, the tribunal doing so may not order anything that contravenes the ICC's order, as properly construed. *Seaboard Air Line R.R. v. Daniel*, *supra*. Since provisions such as Section 11341(a) are essentially "express repealers," the principles applicable to such a provision should also be applicable to an implied repeal claim.

When those principles are applied here, it becomes apparent that the lower courts had jurisdiction to determine the impact of the ICC's actions on rail labor's statutory rights. Moreover, enforcement of the Railway Labor Act cannot be viewed as abridging the ICC's exemptions or approval orders, for as this Court explained with reference to the Federal Communications Commission: "The Commission may impose on an applicant conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant." *Regents of Georgia v. Carroll*, 338 U.S. 586, 600 (1950).

**V. THE INTERSTATE COMMERCE ACT DOES NOT RESTORE TO THE FEDERAL COURTS THE JURISDICTION WHICH CONGRESS HAS WITHDRAWN BY THE NORRIS-LAGUARDIA ACT**

Without in any way identifying what specific provision of the Interstate Commerce Act is directed to, and binding on P&LE employees, making it illegal to strike in an effort to require a carrier to bargain over rates of pay, rules or working conditions, petitioner and the ICC nevertheless assert that the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, and in particular Section 4 of that Act, 29 U.S.C. § 104, *must* be “accommodated” to the transportation statute to enable the federal courts to enjoin a strike in violation of that transportation statute.<sup>46</sup> That argument, respondent RLEA respectfully submits, is without merit, for as we have explained above, the Interstate Commerce Act is not a labor statute, and thus, the anti-injunction Act’s withdrawal of jurisdiction may not be accommodated to that Act.<sup>47</sup>

As this Court has emphasized many times before, Congress, through its passage of the Norris-LaGuardia Act,

<sup>46</sup> Petitioner argues that rail labor’s strike was enjoinable as a violation of the Railway Labor Act, but as we have shown above, that assertion is erroneous. Since petitioner failed to comply with its “obligation[s] imposed by law” which are involved in this dispute, and since it failed to make “every reasonable effort to settle” this dispute “by negotiation or with the aid of any available governmental machinery of mediation” (29 U.S.C. § 108), it lacked standing to seek an injunction. *E.g.*, *Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western R.R.*, 321 U.S. 50, 57-58 (1944). That fact also barred the P&LE from seeking an injunction to enforce the transportation statute. *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, *supra*.

<sup>47</sup> RLEA submits that petitioner and the ICC cannot establish that a strike by rail labor would violate the Interstate Commerce Act since the last clause of Section 20 of the Clayton Anti-Trust Act, 29 U.S.C. § 52, specifically immunizes such a strike from being considered as a violation of that transportation statute. *See, United States v. Hutcheson*, 312 U.S. 291, 236-37 (1941)

withdrew from the federal courts jurisdiction to prohibit any person or persons from “[c]easing or refusing to perform any work or to remain in any relation of employment; . . . [g]iving publicity to the existence of, . . . any labor dispute, whether by advertising, speaking, patrolling, . . . ; or [a]dvising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified” in “any case involving or growing out of any labor dispute. . . .” 29 U.S.C. § 104(a), (e) and (i). Congress also defined “labor dispute” as used in that Act as including “any controversy concerning terms or conditions of employment . . . .” 29 U.S.C. § 113(c). That Act and its limitations on federal court jurisdiction clearly applies to the P&LE’s request for an injunction in this case. *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, *supra*.

Notwithstanding the obvious restrictions of that Act, petitioner and the ICC assert that the Norris-LaGuardia Act must be accommodated to the policies of the Interstate Commerce Act because that statute is a “labor statute” in that it contains “a comprehensive scheme for the resolution of labor protection issues arising out of ICC-regulated transactions.” P&LE Brief at 59. Much of what has been said above shows the absurdity of the P&LE’s and the ICC’s position, for Congress has not made the transportation statute “part of a pattern of labor legislation.” *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 42 (1957). Instead, the transportation statute and the labor statute are part of a pattern of rail commerce regulation, and as this Court has emphasized before, “the Norris-LaGuardia Act’s ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, nonlabor statute” such as the Interstate Commerce Act. *Burlington Northern R.R. v. BMW*, *supra*, 481 U.S. at 435 n.3, quoting *Order of Railroad Telegraphers*, *supra*, 362 U.S. at 339.

Petitioner's assertion that the transportation statute's "comprehensive scheme" for the resolution of labor disputes arising from ICC-regulated transactions is the type of dispute resolution mechanism to which an accommodation of the anti-injunction Act may be made, is erroneous for another reason as well—it ignores the fact that the ICC's *Ex Parte 392* decision has not channeled the competing economic forces of labor and the P&LE into a "special process" intended to compromise them evenly, and thus, there can not be an accommodation of the labor statute to that process. *Chicago River, supra*, 353 U.S. at 40-41. Whether or not the ICC will impose employee protection under Section 10901 does not turn on the importance which rail labor places on such protections, but instead, depends upon whether the ICC, in balancing the public interest factors enumerated in 49 U.S.C. § 10101a, of which rail labor's interests are only one, determines, in the virtually unreviewable exercise of its discretion, that the public interest will be served if those minimum benefits are imposed. If the ICC imposes protections, the carriers have the option of accepting that decision, or cancelling their sale. Rail labor has no such option.

Moreover, in over a score of cases under Section 10505 exemptions from the requirements of Section 10901, the ICC has not *once* exercised its discretion and imposed protections for employees, and, indeed, has informed the industry that it will not exercise its discretion in favor of labor unless "exceptional circumstances" are shown. *FRVR Corp.—Exemption, supra*, Pet. in No. 87-1888 at 113a.<sup>45</sup>

<sup>45</sup> As the ICC explained in its *FRVR* decision, *supra*, (*id.* at 113a-14a; footnotes omitted):

The Commission would consider as exceptional, situations in which there was a misuse of the Commission's rules or precedent, or where existing contracts specified that line sales were subject to procedural or substantive protection. Further, the exemption will be modified where labor can demonstrate in-

As even a cursory examination of the *FRVR* standard shows, the ICC's administration of Section 10901 has relegated rail labor "to a 'small voice of protest' without the possibility of either negotiation or economic self-help." *P&LE I*, Pet. in No. 87-1589 at A-12. This Court has never sanctioned accommodating the policies of the Norris-LaGuardia Act to such an uneven process, and indeed, any such accommodation would be contrary to Section 2 of the anti-injunction statute, which requires that the Act be construed in such a way that the federal labor policy is enforced. 29 U.S.C. § 102. This case, therefore, is not one of those "limited circumstances" where the Norris-LaGuardia Act may be accommodated to the transportation statute, even if that statute were, which it is not, a "labor statute." *Burlington Northern R.R. v. BMWE, supra*, 481 U.S. at 444-46.

### CONCLUSION

For the reasons set forth herein, respondent RLEA respectfully submits that the judgment below should be affirmed.

Respectfully submitted,

WILLIAM G. MAHONEY  
JOHN O'B. CLARKE, JR.\*  
HIGSAW & MAHONEY, P.C.  
Suite 210  
1050 - 17th Street, N.W.  
Washington, D.C. 20036  
(202) 296-8500  
*Attorneys for Respondent  
Railway Labor Executives'  
Association*

Date: March 3, 1989

\* Counsel of Record

jury that was unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communities and locales.

## **APPENDICES**

**APPENDIX A**

**Railway Labor Executives' Association  
Member Organizations**

- \*American Railway & Airway Supervisors' Association  
(Division of TCU) ;
- \*American Train Dispatchers' Association;
- \*Brotherhood of Locomotive Engineers;
- \*Brotherhood of Maintenance of Way Employes;
- \*Brotherhood of Railroad Signalmen;
- Brotherhood of Railway Carmen (Division of TCU) ;
- Hotel Employees and Restaurant Employees  
International Union;
- \*International Association of Machinists  
and Aerospace Workers;
- \*International Brotherhood of Boilermakers, Iron  
Ship Builders, Blacksmiths, Forgers and Helpers;
- \*International Brotherhood of Electrical Workers;
- \*International Brotherhood of Firemen and Oilers;
- International Longshoremen's Association;
- National Marine Engineers' Beneficial Association;
- \*Railroad Yardmasters of America (Division of UTU) ;
- Seafarers International Union of North America;
- \*Sheet Metal Workers' International Association;
- \*Transport Workers Union of America;
- \*Transportation • Communications International Union  
(TCU) ; and
- \*United Transportation Union.

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\* Those RLEA organizations which represent P&LE employees.

## APPENDIX B

*Constitutional Provision and Statutes Relied Upon*

- I. United States Constitution,  
Article I, Section 8, clause 3
- II. Clayton Anti-Trust Act (Excerpts)  
A. Section 20, 29 U.S.C. § 52
- III. Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*  
(Excerpts)  
A. Section 11347, 49 U.S.C. § 11347
- IV. Norris-LaGuardia Act (Excerpts)  
A. Section 2, 29 U.S.C. § 102  
B. Section 8, 29 U.S.C. § 108  
C. Section 13, 29 U.S.C. § 113
- V. Railway Labor Act, 45 U.S.C. § 151, *et seq.*  
(Excerpts)  
A. Section 2 Seventh, 45 U.S.C. § 152 Seventh

## I. United States Constitution, Article I, Section 8, clause 3

[The Congress shall have the power . . .] to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

## II. Clayton Anti-Trust Act (Excerpts)

## A. Section 20, 29 U.S.C. § 52

That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dis-

pute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

**III. Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*  
(Excerpts)**

**A. Section 11347, 49 U.S.C. § 11347**

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangements may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

**IV. Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* (Excerpts)**

**A. Section 2, 29 U.S.C. § 102**

In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of

property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

**B. Section 8, 29 U.S.C. § 108**

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

**C. Section 13, 29 U.S.C. § 113**

When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or

more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

#### **V. Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* (Excerpts)**

##### **A. Section 2 Seventh, 45 U.S.C. § 152 Seventh**

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

#### **APPENDIX C**

##### **Washington Job Protection Agreement of May 1936 (Excerpts)**

\* \* \* \*

Section 4. Each carrier contemplating a coordination shall give at least ninety (90) days written notice of such intended coordination by posting a notice on bulletin boards convenient to the interested employees of each such carrier and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such coordination, including an estimate of the number of employees of each class affected by the intended changes. The date and place of a conference between representatives of all the parties interested in such intended changes for the purpose of reaching agreements with respect to the application thereto of the terms and conditions of this agreement, shall be agreed upon within ten (10) days after the receipt of said notice, and conference shall commence within thirty (30) days from the date of such notice.

Section 5. Each plan of coordination which results in the displacement of employees or rearrangement of forces shall provide for the selection of forces from the employees of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employees made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employees affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

\* \* \* \*

EXCERPTS FROM WASHINGTON JOB  
PROTECTION AGREEMENT JOURNAL OF  
NEGOTIATIONS

NEW YORK CITY—FEBRUARY 3, 1936

MEMORANDUM

Meeting of Committee of Nine with the Labor Executives was held in Room 3040, Grand Central Terminal, New York, commencing at 10.00 A.M.

*Present:*

Messrs:

H. A. Enochs  
Jno. G. Walber  
William White  
  
E. J. Connors  
C. M. Dukes  
C. A. Clements  
  
C. D. Mackay  
W. J. Jenks—by G. E. Bruch  
C. G. Sibley

*Labor Executives Committee:*

Messrs:

Geo. M. Harrison—Brotherhood of Railway &  
Steamship Clerks  
  
A. Johnston—Brotherhood of Locomotive Engineers  
  
D. B. Robertson—Brotherhood of Locomotive  
Firemen and Enginemen  
  
A. F. Whitney—Brotherhood of Railroad Trainmen

W. D. Johnson—Order of Railway Conductors,  
representing—J. A. Phillips.  
  
T. C. Cashen—Switchmen's Union of North America  
  
E. J. Manion—Order of Railroad Telegraphers  
  
B. M. Jewell—Railway Employees' Department  
  
J. G. Luhrsen—American Train Dispatchers'  
Association  
  
F. H. Fijozdal—Maintenance of Way Employees  
  
A. E. Lyon—Brotherhood of Railroad Signalmen  
of America  
  
H. J. Carr—International Association of Machinists  
  
Roy Horn—International Brotherhood of  
Blacksmiths, etc.  
  
Roy Westgard—International Brotherhood of  
Electrical Workers  
  
F. H. Knight—Brotherhood of Railway Carmen of  
America  
  
J. F. McNamara—Brotherhood of Stationary  
Firemen and Oilers  
  
W. S. Brown—International Organization Masters,  
Mates and Pilots of America  
  
—International Marine Engineers' Beneficial  
Assn.  
  
W. G. Cantley—Statistician—Brotherhood of  
Railroad Trainmen

Also—

Messrs:

H. E. Jones, Asst. Secretary, Bureau of Information  
of the Eastern Railways.  
  
M. L. Long.

After introductions, Mr. Harrison stated that it was their thought of discussing a proposal which would be in the nature of a substitute for the Emergency Railroad Transportation Act. He stated he was authorized to speak for all of the organizations here represented, which included the Express Agency, Southeastern Express Company and the Pullman Company. He further stated that they were prepared to submit a list of the railroads which they were authorized to represent from the labor standpoint, and suggested possibly that the Committee of Nine would submit such a list. Mr. Enochs informed the Labor Executives that his Committee did not represent the Express Agency, Southeastern Express Company nor the Pullman Company.

It was mutually agreed that arrangements as to the hour for beginning and length of conferences would be mutually agreed to as discussions progressed.

Mr. Harrison then stated that they were prepared to work out an agreement but called attention to the situation in Congress, namely, that this being Presidential year Congressmen were disposed to adjourn at as early a date as possible. As the Emergency Railroad Transportation Act will expire on June 16, 1936 the Labor Executives felt it necessary to have ready a proposed bill for introduction into the Congress in the event that the present negotiations failed of reaching a settlement. Such a bill has not as yet been filed.

It was agreed that any publicity to be given of the meetings would be in language to be agreed upon between Mr. Enochs and Mr. Harrison.

Mr. Enochs then read Mr. Harrison's letter of December 6, 1935 to Mr. Pelley and also Mr. Enochs' letter to Mr. Harrison of January 21, 1936 as placing before the meeting the subject for discussion. Immediately following this, Mr. Harrison handed to Mr. Enochs a copy of a proposal which had been prepared by the Labor Execu-

tives. There followed a general discussion of the proposal—

*Paragraph 1*—Mr. Harrison explained the intent of this paragraph is to cover various forms of coordination or abandonment of facilities by either a single carrier or two or more carriers. After some detailed discussion, Mr. Enochs called attention to the question of seniority involved in any coordination.

*Paragraph 2*—Mr. Harrison read this paragraph and explained the intent was to provide that the employees should be no worse off as to compensation in cases of coordination. Question was raised as to whether any of the employees who under this paragraph would receive compensation while unemployed could be used in some other occupation,—for instance—highway crossing watchman, and if so, what seniority questions will arise. Mr. Harrison advised that it was not the intent of the Labor Executives to propose that employees should be placed on jobs where they hold no seniority. He also stated that this question of handling the individuals involved was covered in their Paragraph 5. It was also explained by Mr. Harrison that some of the organizations, namely, Engine and Train Service, have constitutional provisions covering seniority in cases of coordination. The other organizations usually place the authority for handling questions of this sort in the hands of their Grand Lodge Officers.

Mr. Alvanley Johnston of the Engineers stated that his organization would not interfere with the division committees on the various railroads in the handling of seniority, holding that this committee of labor executives cannot enter into agreements involving the handling of seniority.

Mr. Whitney of the Trainmen stated that Mr. Johnston had expressed his organization's position as well. He also called attention to the fact that many mergers had

been consummated in the past, all being done under their respective agreements,—also stating—“We are without authority to flirt with seniority.”

Mr. W. D. Johnson, representing the Conductors, stated that their organization had constitutional provisions dealing with this matter and that this committee cannot agree to anything contrary to the seniority provisions as defined by their organization.

Mr. Enochs suggested that possibly we could by discussion arrive at some general principle which would govern in the allocating of employees, calling particular attention to the questions of craft point seniority involving very generally Shop Craft Employees.

Mr. Harrison called attention to the fact that they were making a concession in proposing that employees whose services are not needed due to coordination while so employed should be allowed but two-thirds of their salary, he holding that under the Emergency Act they were now entitled to full salary. He also explained that if any of such employees were called back into service they should receive their full rate of pay. Mr. Harrison further amplified his position by illustrating how his organization would handle a case under this paragraph, first stating that Clerks and Freight Handlers have interchangeable seniority and in the working out of a coordination the junior clerks would bump back to freight handlers and would be paid the difference between their rate as clerks and freight handlers' rate, but the freight handlers displaced from employment would receive two-thirds of their compensation until they may be called back to trucking.

NEW YORK CITY—FEBRUARY 4, 1936.

# MEMORANDUM

Meeting of the Committee of Nine with the Labor Executives was held in Room 3040, Grand Central Terminal, commencing at 9.30 A. M.

Present—Same persons as at the meeting on the third, and in addition—

Mr. E. L. Oliver, Director of Research, Brotherhood of Railway and Steamship Clks.

Mr. Enochs referred to the employes' proposal which had been handed to the Committee of Nine at the meeting on the third and in connection with Paragraph 1 stated that his understanding of the employees' proposal at Chicago was that the effect of coordination to be discussed was that caused by the coordination of two or more carriers and that nothing would be done to interfere with the actions of individual carriers. He expressed surprise that the labor executives had presented a proposal which was much beyond the scope as originally discussed at the meeting in Chicago. He questioned whether the railroad executives would have agreed to appointing a committee for the purpose of a general exploration of the subject if they had known it was intended to apply to coordination on individual carriers. He stated that the Committee of Nine cannot agree to consider the effect upon individual carriers.

\* \* \*

Mr. Enochs called attention to action taken by various industries in making allowances to employees separated from employment and commented that none of these companies had allowed compensation comparable to that which the labor executives had proposed. He also cited examples of railroads which had made allowances, such as the Union Pacific, Baltimore & Ohio, Pennsylvania,—all of these allowances having been based upon the

equities in each case, there being no generally accepted bases. He further stated that no railroad permits the payment of money for services not rendered without authority of the Board of Directors, except in such specific cases as vacations and sick allowances, in which event designated officers are permitted to allow compensation of the Trainmen and Mr. Johnson of the Engineers each stated that they had ample organization laws to cover the situation of merging or abandoning of railroads in dealing with the questions of seniority.

\* \* \* \*

Mr. Enochs again called attention to the questions of seniority involved in this matter, making the point that seniority is primarily of interest to the employees and the leaders of these organizations must assume their leadership to see that all of the employees they represent are accorded all seniority rights due them.

\* \* \* \*

The question was raised as to how the seniority questions should be handled particularly in the case of shop craft employees who have craft point seniority and Mr. Harrison stated that this was a question which must be dealt with by the organizations.

Mr. Jewell then stated that prior to Federal Control his organizations had dealt with mergers involving seniority along the general policy that the individuals concerned follow the work and that such was their policy today. They have in some instances merged seniority rosters but the international officers have not dealt with seniority mergers along one general policy on account of company unions. He felt that so far they have met the situation in a fair and equitable manner but that if an agreement is reached here his organization will attempt to formulate some policy to be followed.

WASHINGTON, D.C., MAY 11, 1936

Meeting was held with the Labor Executives in Room 1030, Transportation Building, Washington, D.C. at 10.50 A.M.

*PRESENT:*

Messrs.

H. A. Enochs  
H. A. Benton  
G. E. Bruch  
C. A. Clements  
E. J. Connors  
C. M. Dukes  
J. B. Parrish  
William White  
  
E. M. Davis  
G. W. Knight  
J. M. Souby  
  
H. E. Jones  
M. L. Long  
Ed. Murrin

*Labor Executives:*

G. M. Harrison—Brotherhood of Railway & Steamship Clerks  
W. D. Johnson—Order of Railway Conductors  
S. R. Harvey—Brotherhood of Railroad Trainmen  
Mr. Burke—Brotherhood of Locomotive Engineers  
D. B. Robertson—Brotherhood of Locomotive Firemen & Enginemen  
F. H. Fljozdal—Brotherhood of Maintenance of Way Employees

A. E. Lyon—Brotherhood Railroad Signalmen  
of America

J. G. Luhrsen—American Train Dispatchers' Assn.

B. M. Jewell—Railway Employees' Department,  
AF of L

A. L. Jones—National Marine Engineers' Beneficial  
Assn.

Mr. Obie—Order of Sleeping Car Conductors

\* \* \* \*

In connection with Section 5—Mr. Harrison stated that no definite formula could be used for the assignment of men in coordinated operations but it was the thought of the labor executives that the assignment and placement of employees would be the subject of an agreement in each particular case. He further stated in cases where on one railroad involved in a coordination and employees are represented by the organizations, parties to the agreement and another railroad involved in the coordination the employees are not represented by the organizations, parties to the agreement, that the employees will be governed by the agreement as to assignment of employees made by the organization party to the agreement.

Mr. Enochs pointed out a conflict between Sections 3 and 5, commenting that under the language used in Section 5 the organizations here represented make the agreement whether they represent the employees or not. Mr. Harrison stated the agreement applies only to the extent the organization represents the employees. Mr. Enochs then read a portion of Section 3 which stated that a coordination involving a carrier or carriers, parties to the agreement with a carrier or carriers, not parties to the agreement, will be made only upon the basis of an agreement approved by all of the carriers, parties to the

coordination and all of the organizations of employees involved.

\* \* \* \*

In connection with Section 5, Mr. Enochs asked that if in case an agreement as to the assignment of men is not reached whether this would be handled as a dispute under Section 13 and Mr. Harrison replied in the affirmative. It was pointed out that Section 13 as written did not provide for the handling of disputes or matters covered by Section 5.

\* \* \* \*

There was general discussion as to methods used in determining the placement of men in coordinated operations. Mr. Robertson citing particularly the experience of the organizations on the Canadian National, expressing the thought that no particular method should be laid down in the agreement because each coordination must be handled in a different manner. Mr. Enochs stated the desire of the conference committee was to secure the assistance of the executive officers of the organizations in having the local representatives of the organizations make agreements with the managements so that the benefits of the general agreement would accrue uniformly and in a fair manner to the employees affected.

\* \* \* \*

Mr. Enochs stated that the carriers are interested in securing qualified employees to do the work and Mr. Harrison stated that the assignment of men is covered by regulation agreements and if employees are qualified and have necessary seniority they must be assigned to the jobs.

After some further discussion as to the meaning of Section 5, Mr. Harrison stated that the labor executives will suggest a change in the language.

\* \* \* \*

Section 13—Mr. Enochs suggested that this section should be made a portion of the first sentence of Section 12 of the Joint Conference Committee's proposal and rearrange the language of Section 13 of the labor executives' proposal. He also called attention to the fact that no provision is made to cover the expenses of arbitration. Mr. Harrison explained it was the intent in this connection to have a similar arrangement for paying expenses as outlined in their Section 10(d), dealing with property losses. He pointed out that the proposal of the conference committee will also bring for review of the joint committee proposed in Section 13 local agreements covering coordinations. Mr. Enochs voiced the opinion that there should be some control by the parties who negotiate the agreement in order that it might be uniformly applied. Mr. Harrison stated he personally was not opposed to this suggestion but the labor executives would consider the matter. Mr. Robertson stated that it must be understood that this committee of eight provided for by Section 13 would not be permitted to interfere with agreements between the organizations and the individual roads. It was pointed out that cases might arise where the local parties might not make an agreement and Mr. Enochs expressed the thought that it would be necessary for the labor executives to police the matter in order to make effective the general agreement covering coordinations.

\* \* \* \*

It was suggested that possibly in case of failure to reach agreement by the two parties that three neutrals be selected instead of one, and Mr. Harrison objected to this, pointing out that experience has shown that two of the so-called neutrals became advocates so that there was in effect but one neutral who eventually decided the issue.

WASHINGTON, D.C., MAY 13, 1936

Meeting was held with the Labor Executives in Room 1030, Transportation Building, Washington, D.C. at 11.00 A.M.

*PRESENT:*

Messrs.

A. A. Enochs  
H. A. Benton  
G. E. Bruch  
C. A. Clements  
E. J. Connors  
C. M. Dukes  
J. B. Parrish  
Jno. G. Walber  
William White  
  
E. M. Davis  
G. W. Knight  
C. C. Handy  
J. M. Souby  
Ed. Murrin  
  
H. E. Jones  
M. L. Long

*Labor Executives:*

Messrs.

G. M. Harrison—Brotherhood of Railway & Steamship Clerks  
W. D. Johnson—Order of Railway Conductors  
S. R. Harvey—Brotherhood of Railroad Trainmen  
Mr. Burke—Brotherhood of Locomotive Engineers  
D. B. Robertson—Brotherhood of Locomotive Firemen & Enginemen

- T. C. Cashen—Switchmen's Union of North America
- F. H. Fljozdal—Brotherhood of Maintenance of Way Employees
- A. E. Lyon—Brotherhood Railroad Signalmen of America
- B. M. Jewell—Railway Employees' Department, A. F. of L.
- J. G. Luhrsen—American Train Dispatchers' Association
- Roy Horn—International Brotherhood of Blacksmiths, etc.
- Mr. Obie—Order of Sleeping Car Conductors
- Donald R. Richberg—Counsel

Mr. Harrison referred to the last conference at which the Joint Conference Committee went over the draft of agreement etc. Mr. Harrison replied that the agreement did not include these services; it applied only to employees covered by agreements and is co-extensive with the schedule agreements.

Section 3. Mr. Enochs stated the conference committee objects to the last clause dealing with corporate organizations, the effect being to bring under the agreement actions of a single carrier. It was also suggested that this subject should be left to the discretion of the Interstate Commerce Commission. Mr. Robertson voiced the opinion that this paragraph was designed to cover cases where two carriers are listed in the agreement each as single carriers but some time later are consolidated by authority of the Interstate Commerce Commission into one carrier. In such cases it was the thought of the labor executives that the agreement would protect the employees. There was a disagreement between Mr. Robertson and Mr. Harrison on this point. Mr. Harrison explained that the purpose of the clause was that if a single carrier, party to the agreement later unifies their

corporate organizations by authority of the Interstate Commerce Commission which resulted in a change in operations, then the agreement would apply, even though the carrier is listed as a single carrier, party to the agreement. He cited as illustrative the Santa Fe and Santa Fe of Texas; the Rock Island and Rock Island and Gulf; Frisco and Frisco of Texas.

\* \* \* \*

#### Section 4—No disagreement.

Section 5. Mr. Enochs stated this should be rephrased using part of the proposals of the labor executives and of the conference committee. A clause should also be inserted providing for settling a dispute in case of failure to agree. Mr. Harrison stated there was no objection to this and they proposed rewriting their Section 13 to cover this matter. It was suggested that a time limit be fixed within which agreement must be reached so that the dispute can be forwarded for settlement. Mr. Harrison explained that they had thought a 30-day limit from the time a dispute arises. Question was raised whether the agreement referred to in this paragraph must be in accordance with seniority rules and practices in effect on the home roads and Mr. Harrison replied that no change in seniority rules or practices on the roads can be brought about by this agreement; that the management and the committees on the roads are the only parties who can modify the schedules. He stated that the assignments must be made in accordance with the rules and practices existing on the home roads but the allotments of employees would be in accordance with the agreement reached.

\* \* \* \*

It was suggested that the words "accepted as appropriate" be used instead of "recognized as appropriate" in the first sentence of conference committee proposed Section 5.

At 12.45 P.M. recess was taken until 2.15 P.M.

(21) (34)  
Nos. 87-1589 and 87-1888

Supreme Court, U.S.

FILED

MAR - 22 1989

JOSEPH F. SPANGL, JR.

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Respondent.*

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION and  
INTERSTATE COMMERCE COMMISSION,  
*Respondents.*

ON WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

G. Edward Yurcon  
THE PITTSBURGH & LAKE  
ERIE RAILROAD COMPANY  
780 Commerce Court  
Four Station Square  
Pittsburgh, Pennsylvania 15219  
(412) 263-3806  
Counsel for Petitioner

Richard L. Wyatt, Jr.\*  
Ronald M. Johnson  
Charles L. Warren  
AKIN, GUMP, STRAUSS,  
HAUER & FELD  
1333 New Hampshire Ave., N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 887-4000  
Counsel for Petitioner

\*Counsel of Record

March 22, 1989

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#### ARGUMENT

#### I. NOTHING IN THE RAILWAY LABOR ACT RESTRICTS MANAGEMENT'S FUNDAMENTAL RIGHT TO DECIDE WHETHER TO STAY IN BUSINESS

As respondent Railway Labor Executives' Association ("RLEA") notes in its brief, "[r]ailroads have been expanding, contracting and going out of business virtually since the inception of the industry . . . ." RLEA Br. at 12. Until the district court issued its decision in this case, however, no court had ever held that railroads were required to exhaust the bargaining procedures of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), before taking such fundamental actions. Congress clearly intended -- and rail labor has never before disputed -- that the regulatory procedures of the Interstate Commerce Commission ("ICC") provide the sole constitutional means by which rail labor can influence a railroad's decision to go out of business. Neither the provisions of the RLA nor its legislative history warrant an interpretation of the scope of management's rights under that statute that is diametrically opposite the understandings expressed by this Court in cases decided under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"). The RLA, like the NLRA, does not prevent an employer from making fundamental changes in the scope and direction of its business notwithstanding that such changes will have some impact on its employees.

#### A. The Right To Make Decisions Regarding The Scope And Direction Of The Business Enterprise Is Not Unique To NLRA Employers

As noted in *The Pittsburgh & Lake Erie Railroad Company's* ("P&LE") Opening Brief at 18-21, this Court has recognized that a collective bargaining agreement does not constitute a guarantee of employment, *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); that an employer has an "absolute right" to go out of business for any reason, *Textile Workers v. Darlington Manufacturing Co.*, 380

U.S. 263, 268 (1965) ("*Darlington*"); and that a decision to shut down part of a business is not part of an employee's "wages, hours, and other terms and conditions of employment," *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981) ("*First National Maintenance*"). In *Darlington* and *First National Maintenance*, this Court upheld the employer's right to implement its decision despite the plain fact that employees would lose their jobs as a result of the employer's action. See 380 U.S. at 267 n.6; 452 U.S. at 677. A requirement that P&LE bargain over the effects of its decision to go out of business before implementing its decision would be diametrically opposite to the principles underlying *Darlington* and *First National Maintenance*.

Recognizing this, RLEA contends that the teachings of those cases are inapplicable here because of "crucial differences" between the NLRA and the RLA. While this Court has cautioned that NLRA principles cannot be "imported wholesale" into the RLA, *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969), the mere fact that the two labor statutes differ in certain respects does not automatically render NLRA principles inapplicable in RLA cases. It would be as unwise to reject NLRA principles out of hand because of irrelevant differences between the two statutes as it would be to apply such principles where the differences are relevant. Indeed, this Court has found NLRA precedent helpful in several cases arising under the RLA. See, e.g., *Jacksonville Terminal Co.*, 394 U.S. at 383 ("The Court has in the past referred to the NLRA for assistance in construing the Railway Labor Act . . . and we do so again here.").

The first "crucial difference" between the two statutes that RLEA identifies is that "[u]nlike the NLRA, the Railway Labor Act was designed to apply to a heavily regulated industry . . . ." RLEA Br. at 17 (emphasis in original). RLEA contends that *Darlington* cannot apply here because unlike other employers, railroads were never free to go out of business. RLEA Br. at 19-21. That a railroad must seek ICC approval to go out of business, however, does not suggest that it has any greater duty to

bargain with its unions over that decision than would an employer not subject to ICC regulation. If anything, the fact that Congress has chosen to vest the ICC with plenary authority to regulate a railroad's exit from the industry -- including the determination of whether to impose labor protective benefits as a condition of its approval -- weighs against inferring any obligation to bargain with its unions at all. See *infra* at 29-31; see also United States Br. at 18-21. Rail labor, like management, comes into the railroad industry knowing that the ICC will have the final say on when and on what terms the railroad will be permitted to go out of business, and rail labor also knows that the ICC's authority extends to the determination of what employee protections are consistent with the public interest, and hence should be imposed as a condition of its approval. The regulated nature of the railroad industry simply does not justify an inference that Congress intended to require railroads to satisfy the processes of two statutory regimes, the ICA and the RLA, before going out of business.<sup>1</sup>

RLEA also contends that the RLA "was intended by Congress to prevent strikes by eliminating the need to strike," RLEA Br. at 17, and that the breadth of the bargaining and status quo obligations under the RLA are materially different from those under the NLRA.<sup>2</sup> *Id.* The only significant difference between the NLRA and the RLA that RLEA identifies, however, is in the length of the status quo obligation. The NLRA, like the RLA, precludes either party from making unilateral changes to the status

<sup>1</sup>RLEA's attempt to distinguish the railroad industry on the basis of ICC regulation also fails because the NLRA also applies to many regulated industries, such as trucking, communications, maritime, and gas and electric utilities.

<sup>2</sup>The purposes of the NLRA and the RLA are not materially different. Compare *First National Maintenance*, 452 U.S. at 674 ("A fundamental aim of the [NLRA] is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce. . . . Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management.") with *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 148 (1969) ("The Railway Labor Act was passed in 1926 to encourage collective bargaining by railroads and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce.").

quo without first exhausting the bargaining procedures under the applicable statute. See, e.g., *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 108 S. Ct. 830, 833 n.5 (1988). Under the NLRA, however, the parties are required to bargain only to impasse, a process that may take only a few days. Under the RLA, the parties are required to exhaust an "almost interminable" bargaining process that frequently takes years to complete. See P&LE Br. at 22-23 & n.6. Certainly, the potential length of the status quo period under the RLA gives a party resisting change greater leverage in bargaining under that statute than it would have under the NLRA. But the difference in the length of the status quo period under the two statutes implies, if anything, that the scope of mandatory bargaining is narrower under the RLA.

Here, the only relevant comparison between the NLRA and the RLA is between the operative statutory language describing the scope of bargainable subjects under each statute. Section 6 of the RLA, 45 U.S.C. § 156, requires an employer to bargain over "rates of pay, rules, or working conditions." Section 8(d) of the NLRA, 29 U.S.C. § 158(d), requires bargaining over "wages, hours, and other terms and conditions of employment." As explained in P&LE's Opening Brief at 24 n.8, the drafters of the NLRA believed the term "conditions of employment" used in the NLRA to be broader than the term "working conditions" used in the RLA.<sup>3</sup> If, as this Court held in *First National Maintenance*, a decision to shut down part of an operation does not constitute a change in "wages, hours, and conditions of employment," it cannot constitute a change in the narrower "rates of pay, rules or working conditions." RLEA's attempt to read a broader bargaining

<sup>3</sup> Similarly, the term "wages" has been held to be broader than the term "rates of pay" used in the RLA. *Inland Steel Co. v. NLRB*, 170 F.2d 247, 253 (7th Cir. 1948), *aff'd sub nom. American Communications Ass'n v. Douds*, 339 U.S. 382 (1950). The doctrine of *noscitur a sociis* militates against interpreting "working conditions" in a way that is significantly broader than the clearly narrow terms "rates of pay" and "rules" with which it appears. Cf. *Texas & N.O. R.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 568 (1930).

obligation into the language of Section 2, First, RLEA Br. at 17 n.12, fails because neither the admonition "to exert every reasonable effort" to make and maintain agreements nor "to settle all disputes" whatever their source expands the scope of what may be a mandatory subject of bargaining under Section 6.<sup>4</sup>

There are no differences between the NLRA and the RLA that would prevent this Court from applying NLRA principles under the circumstances of this case. A railroad no less than any other employer has a need -- and a right -- to make fundamental decisions regarding the scope and direction of its operations free of union interference. The concept of managerial prerogative that this Court has recognized in its decisions under the NLRA should apply with equal force here.<sup>5</sup>

<sup>4</sup> By comparison, Section 8(d) of the NLRA, which also contains an admonition analogous to RLA Section 2, First, provides that the parties' duty to bargain collectively entails "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . ." 29 U.S.C. § 158(d).

<sup>5</sup> Contrary to RLEA's contention that the NLRA distinction between mandatory and permissive subjects of bargaining is inapplicable under the RLA, RLEA Br. at 16-18 & n.13, such a distinction is entirely consistent with the purposes and provisions of the RLA. The subjects over which the parties are required to bargain under Section 6 were plainly not intended to include all possible subjects over which disputes might arise. Cf. *First National Maintenance*, 452 U.S. at 674-75. RLEA's suggestion that only an administrative agency is capable of drawing the "subtle differences" between the two types of bargaining is unsupported by any authority and is contrary to experience. See, e.g., *ALPA v. United Airlines Inc.*, 802 F.2d 886, 902 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987); *Japan Air Lines Co. v. IAM*, 538 F.2d 46, 51-52 (2d Cir. 1976); *Elgin, Joliet & Eastern Ry. v. Brotherhood of Railroad Trainmen*, 302 F.2d 540, 543-44 (7th Cir.), *cert. denied*, 371 U.S. 823 (1962).

**B. The Legislative History Does Not Establish Any Intent To Require A Railroad To Bargain Over A Decision To Go Out Of Business**

This Court stated in *Darlington* that the proposition that a businessman could not choose to go out of business if he wanted to "would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent . . . ." 380 U.S. at 270. RLEA purports to find such a "clear manifestation" of legislative intent in the legislative history of the RLA. The legislative excerpts relied on by RLEA, however, do not support its argument.

Conceding that the sale of P&LE would not *violate* the agreements, RLEA, like the court of appeals, argues that the loss of jobs following the sale would nevertheless *change* the agreements. RLEA Br. at 27. Both RLEA and the court of appeals apparently believe that the loss of jobs constitutes a change in "working conditions." Nothing in the legislative history supports this conclusion. The selections from the 1924 hearings on the Howell-Barkley bill merely confirm that Section 2, First and Section 6 were intended to prevent unilateral changes concerning "rates of pay, rules or working conditions," and shed no light whatsoever on whether Congress believed that the loss of jobs as a result of a decision to go out of business would constitute such a change.

RLEA also asserts that Section 2, Seventh of the RLA, which was added to the Act in 1934, "laid to rest" any questions regarding whether Sections 2, First and 6 prohibited unilateral changes in existing agreements. RLEA Br. at 31-32. In support of this claim, RLEA traces the 1934 amendments to the RLA to the 1933 Amendments to the Bankruptcy Act of 1898 and the Emergency Railroad Transportation Act ("ERTA"), and attempts to find in the legislative history of these two statutes a congressional intent to bring changes in the scope and direction of railroad operations within the reach of the RLA. RLEA Br. at 32-33.

RLEA's attempt to bolster its argument with this material is unpersuasive. The 1933 Amendments to the Bankruptcy Act of 1898 were passed, in part, to address the fears of both rail labor and Congress that a trustee or a bankruptcy court would unilaterally alter an agreement that existed between a bankrupt carrier and its employees. The amendments, especially Section 77(o) upon which RLEA places great emphasis, made the RLA applicable to courts and receivers so that the collective bargaining agreements would be "carried into effect and . . . respected by a receiver operating a railroad." 76 Cong. Rec. 5118 (remarks of Sen. Norris). The "central purpose" of the amendments was to "make it possible for [railroad] reorganizations and readjustments to be effected." *Id.* at 5355 (remarks of Rep. Sumner). The only way that the amendments benefited rail labor was through the assurances that pre-bankruptcy contracts signed by the employees would not "be changed by the judge who [had] charge of the bankruptcy proceeding," *id.* at 5359 (remarks of Rep. Cooper), and that "[t]he same law that exists . . . for operating railroads [was] made applicable to trustees." *Id.* at 5358 (remarks of Rep. LaGuardia). While RLEA implies that these amendments clarified the meaning of the RLA's status quo and bargaining obligations, RLEA Br. at 32-33, in fact the amendments merely made those requirements applicable to trustees and courts during a bankruptcy proceeding. Neither the text nor the legislative history of the Bankruptcy Act amendments suggests that Congress intended to expand the scope of the RLA bargaining obligation.

RLEA's "examination" of the language and legislative history of ERTA is equally flawed. RLEA contends that ERTA demonstrates a "clear congressional intent to give rail labor a broad role in entrepreneurial decisions." RLEA Br. at 33. Once again, RLEA attempts to color this narrow and specific legislation as a broad grant of power to rail labor and an intentional curtailment of management rights. However, the legislative history does not support RLEA's characterization.

ERTA was designed to address the Depression's devastating impact on the railroad industry. See E. Latham, *The Politics of*

*Railroad Coordination 1933-1936* 8 (1959). ERTA had "three main purposes": (1) "to promote economies, particularly the avoidance of unnecessary waste resulting from competition"; (2) to promote financial reorganization of the carriers; and (3) to investigate other methods to improve transportation by rail and other forms of transport. S. Rep. No. 87, 73d Cong., 1st Sess. (1937), reprinted in 77 Cong. Rec. 4251 (1933). A federal coordinator was appointed who had vast powers over the business affairs of the nation's railroads, including the power to oversee and order railroad consolidation. In order to further the first purpose behind ERTA, railroads were required to "avoid unnecessary duplication of services and facilities . . . and . . . other waste and preventable expense." *Id.*

Section 7 of ERTA was intended to provide some degree of protection from the impact that the consolidations and reorganizations envisioned by ERTA were expected to have on affected employees. For example, Section 7(a) provided that the coordinator had to "confer" with rail labor before taking any action that affected the interests of employees. However, the opportunity to "confer" meant only the opportunity to be heard before the coordinator could issue an order that affected employee interests. As RLEA's spokesman, Donald R. Richberg, testified at the hearings on ERTA, Section 7(a) "simply . . . put in labor as having participated in the plan." *Hearings on S. 1580 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 1st Sess. 99 (1933). The coordinator did not have to follow the suggestions made by labor representatives and could, in fact, override such suggestions. *Id.* (remarks of Sen. Couzens). The key provision in ERTA protective of labor's interest, which was not mentioned in RLEA's brief, was contained in Section 7(b). This provision froze the level of employee terminations to the number "as shown by the payrolls of employees in service during the month of May 1933." 48 Stat. 214. The provision fell far short of the protection rail labor desired. Latham, at 72. Thus, while RLEA attempts to paint ERTA as granting labor a "broad role" in the entrepreneurial

control of the industry, in fact it did nothing of the sort.<sup>6</sup> ERTA was quite simply "emergency legislation" that addressed a "critical" situation -- the Depression. 77 Cong. Rec. 4872 (remarks of Rep. Shoemaker).

RLEA's mischaracterization of the role and power of labor under ERTA and the Bankruptcy Act infects its further claim that in the 1934 Amendments to the RLA Congress included the "substance" of ERTA and Section 77(o) of the Bankruptcy Act in a new Section 2, Seventh of the RLA. RLEA Br. at 35. However, the legislative history of the 1934 amendments includes virtually no mention of Section 77(o). At the hearings RLEA refers to, Joseph Eastman discussed Sections 77(p) and (q) of the Bankruptcy Act and Section 7(e) of ERTA as examples of Congress' realization that "specific provisions against interference with freedom of choice in the selection of labor representatives should be applied to all railroads, as well as to those which happened to be under control of judges, receivers, or trustees." *Hearings on S. 3266 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 12 (1934). Eastman referred to anti-interference provisions of ERTA and the Bankruptcy Act as support for his recommendation that the RLA be amended to provide protection for employees' rights to organize and be repre-

<sup>6</sup>During the debates on the bill it was stated that "[t]his bill does nothing for labor . . . It freezes the situation at its lowest ebb." 77 Cong. Rec. 4872 (remarks of Rep. Maloney). As finally adopted, ERTA had limited employee protections, and the RLA was made applicable to Section 7 solely to "discourage the use of 'yellow dog' contracts" and to make sure the RLA requirements that applied to trustees and courts under the Bankruptcy Act amendments applied under ERTA as well. 77 Cong. Rec. 4860. ERTA, like the Bankruptcy Act amendments, merely extended the RLA into special legislation without explaining, much less expanding, the scope or nature of the RLA's obligations.

sented. As a result of those hearings, Sections 2, Third and 2, Fourth of the RLA were placed in the permanent law.<sup>7</sup>

Further, RLEA intimates that the version of Section 2, Seventh that Eastman supported was what Congress ultimately adopted in the 1934 amendments, with a few minor changes added for "definiteness" and "clarity."<sup>8</sup> RLEA Br. at 35. The changes added by the carriers' representative were deemed minor by those in attendance at the hearings, since they reflected the intent of Eastman's proposed Section 2, Seventh. RLEA seeks to gloss them over since changes made in the final bill undercut RLEA's theory and mischaracterization of Eastman's version of Section 2, Seventh.<sup>9</sup> The legislative history of the 1934 amendments does not reveal any extensive discussion of Section 2, Seventh and it most certainly does not indicate that Section 2, Seventh, as adopted, was intended to incorporate RLEA's exaggerated view of its role under ERTA and the Bankruptcy Act. The express terms of

<sup>7</sup>As pointed out in this Court's recent decision in *Trans World Airways, Inc. v. IFFA*, 57 U.S.L.W. 4283 (U.S. Feb. 28, 1989), the legislative history of the 1934 amendments to the RLA deals mostly with the employees' representation and organization rights. *Id.* at 4287-88. Eastman's testimony is consistent with the legislative history of those amendments.

<sup>8</sup>The version Eastman supported provided that "[n]o carrier, its officers or agents shall change the rates of pay, rules or working conditions of its employees, except in the manner prescribed in Section 6 and in other provisions of this Act relating thereto." S. 3266, 73d Cong., 2d Sess. § 2, Seventh (1934). However, in its brief, RLEA neglects to state what Section 2, Seventh stated in its final form. The final version states that "[n]o carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 156 of this title." 45 U.S.C. § 152, Seventh (emphasis added).

<sup>9</sup>RLEA's interpretation itself is contrary to the language of Section 2, Seventh, to the intent of its drafters and to the statements of labor's spokesman at the 1924 hearings, Donald R. Richberg. Richberg stated that the original bill that became the RLA provided that "[t]he mutual obligations of employer and employee which are to be enforced by law must be obligations that arise out of the voluntary agreements of employer and employee." *Hearings on S.2646 Before the Subcomm. of the Senate Comm. on Interstate Commerce*, 68th Cong., 1st Sess. 17 (1924).

Section 2, Seventh prohibit only those changes that affect the terms of agreements. RLEA's mischaracterization of the terms of Section 2, Seventh and the legislative history applicable to a rejected version of the provision seeks to give the present Section 2, Seventh a much broader scope and effect than was originally intended.

Thus, when the excerpts of legislative history cited by RLEA are put back into context, they provide no support for RLEA's contention that the RLA requires pre-implementation bargaining over the effects of a sale of the railroad, much less the "clear manifestation" of legislative intent that this Court has required before it will reach such a result.

#### C. P&LE Was Not Required To Exhaust Section 6 Bargaining Over The Effects Of Its Decision Prior To Implementation

RLEA also argues that even if *First National Maintenance* were held to apply under the RLA, P&LE would still have to bargain over the effects of its decision prior to completing the sale to Railco. RLEA Br. at 23-24. RLEA reads *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960) ("*Telegraphers*"), to mandate the same result under the RLA. RLEA Br. at 24-26. While both *First National Maintenance* and *Telegraphers* found that the employers in those cases had a duty to bargain over the effects of certain decisions, neither case held that such bargaining had to be completed before the decisions could be implemented. In *First National Maintenance* this Court held only that the employer had to give the union a significant opportunity to bargain, with such bargaining to be conducted in a meaningful manner and at a meaningful time. 452 U.S. at 681-82. If such bargaining had to be completed before the decision could be implemented, the unions would have the same "powerful tool for achieving delay" that caused this Court to reject the decision-bargaining duty in the first place. *See* 452 U.S. at 681, 683. Recognizing this, the exhaustion of bargaining efforts over effects prior to implementation has not been required where it

would not be practical, and bargaining over effects has not been required at all where it would amount to bargaining over the decision itself.<sup>10</sup> See P&LE Br. at 23-24 n.7. In *Telegraphers*, this Court said nothing at all about the railroad's ability to implement its decision to close certain stations pending bargaining with the union over the effects of that decision.<sup>11</sup>

Imposing a duty on an employer to refrain from implementing a non-bargainable decision while it completes the "almost interminable" bargaining procedures of the RLA regarding the effects of that decision would lead to absurd results, as the present case illustrates. As already noted, bargaining over effects presents the same potential for interference with the employer's right to manage its affairs that this Court has found unjustified in the context of decision bargaining. Just as with decision bargaining, "the burden placed on the conduct of the business" by a duty to exhaust bargaining over the effects of a decision prior to implementation outweighs any possible benefit to

<sup>10</sup> Since *First National Maintenance* the NLRB has further defined the "effects" bargaining obligation of an employer. In *Litton Financial Printing Division*, 286 N.L.R.B. No. 79 (1987), the NLRB recognized that those "effects" of a non-bargainable decision which are "inextricably intertwined" with the decision itself are not bargainable. The Board adopted a policy of requiring bargaining over effects proposals only if the scope of those proposals and resultant bargaining does not "compromise the employer's interest in 'unencumbered decision making'." Slip op. at 12. See also *Otis Elevator*, 269 N.L.R.B. 891 (1984) (test to determine bargainability of effects proposal is whether proposals can be addressed exclusive of the decision).

<sup>11</sup> Unlike P&LE, the railroad in *Telegraphers* did not plan to go out of business or make significant changes in the scope or direction of its business; rather, it intended only to close certain stations along a stretch of track over which it would continue to operate. Thus, the elimination of stations and jobs at issue in *Telegraphers* is comparable to the change in the locations at which employees were to report to work in *Detroit & Toledo Shore Line v. UTU*, 396 U.S. 142 (1969), which this Court ruled could not occur without exhaustion of Section 6 procedures. In neither case was the action at issue subject to the ICC's jurisdiction. Requiring bargaining in such a situation would in no way undercut P&LE's position here, since P&LE is not merely changing a working condition in an on-going operation, but rather going out of business pursuant to an ICC order.

labor-management relations that such bargaining might bring. See *First National Maintenance*, 452 U.S. at 679, 686. This is especially true under the RLA, the "purposely long and drawn out" bargaining procedures of which would provide an ideal method of achieving the unions' "practical purpose" in such circumstances, i.e., "to delay or halt the closing." *Id.* at 681. Because few decisions regarding the "scope or direction of the enterprise" can await the exhaustion of Section 6 procedures, a requirement that an employer exhaust bargaining over effects before implementing a non-bargainable decision would as a practical matter eliminate any distinction between decision and effects bargaining under the RLA, and would force RLA employers to bargain with rail labor over virtually every management decision that could be construed to have any impact at all on employees. It would, in short, make "the elected union representative . . . an equal partner in the running of the business enterprise in which the union's members are employed." *Id.* at 676.

The potential for abuse under RLEA's interpretation is tremendous. For example, an employer that had successfully resisted previous collective bargaining efforts by its unions to gain employee benefits in the event it went out of business could still be prevented from doing so by the mere filing by those same unions of yet another such proposal at the time the employer decided to act. Indeed, even an employer that had sought to avoid this result by acceding to union demands for employee protections in pre-decision bargaining could still find itself blocked if, in the context of the actual transaction, the unions were able to identify and proposed to bargain over some effect that had not been anticipated.

As noted by Justice Stewart in his concurring opinion in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 223 (1964), management makes innumerable decisions that do not directly involve "rates of pay, rules or working conditions" yet in some way affect employees. Such decisions would give rise, in RLEA's view, to a duty to exhaust bargaining over effects before management can act. The same harm that caused this Court in

*First National Maintenance* to reject a duty to bargain over such decisions requires that this Court also reject RLEA's claim that bargaining over effects must be exhausted prior to their implementation.

## II. P&LE'S EXERCISE OF ITS RIGHT TO GO OUT OF BUSINESS AS A RAILROAD AND ABOLISH UNNEEDED JOBS IS NOT DEPENDENT UPON ITS COLLECTIVE BARGAINING AGREEMENTS OR ITS PAST PRACTICES

Although superficially simple and seemingly straightforward, the view of the status quo espoused by RLEA and *amicus* AFL-CIO represents a startling innovation. If accepted by this Court, it would convert what Congress intended to be a passive shield against hasty and potentially disruptive unilateral action into a potent sword that would give unions a veto power over every management decision that conceivably has any effect on employees. Anytime a "carrier seeks to do something which it has never done before," RLEA Br. at 44, its unions could demand that the carrier exhaust the "almost interminable" bargaining procedures of the RLA before implementing its decision. Innumerable quintessential management decisions over which unions have never been thought to have a say, such as decisions to drop unprofitable operations, sell capital assets, or even file for bankruptcy -- all of which may have a direct effect on employees, and many of which may be subject to ICC jurisdiction -- will suddenly have to await union approval before being implemented. Congress never intended such a result, and neither Section 6 of the RLA nor this Court's prior decisions requires it.

### A. Except To the Extent Management May Have Bargained It Away, Management Retains Its Inherent Right To Determine The Scope And Direction Of Its Business Operations

According to RLEA and *amicus* AFL-CIO, a railroad may exercise its managerial prerogatives only to the extent such

prerogatives are embodied in agreements or have previously been exercised in such a way as to become part of the "past practice" between the parties. RLEA Br. at 43-44; AFL-CIO Br. at 26. If management has not thus preserved its rights, the argument goes, then it may not for the first time exercise those rights during a period in which the status quo is in effect. Incredibly, RLEA and *amicus* AFL-CIO contend that such a disabling status quo period can be imposed on the employer merely by filing a notice seeking to amend the contract to restrict the very right at issue.

This Court's decisions in *Darlington, J.I. Case, First National Maintenance*, and numerous other cases<sup>12</sup> implicitly recognize that management always retains the ability to make and implement certain inherently managerial decisions, and does not forfeit the right to make those decisions just because the occasion to exercise its rights does not arise. Thus, in *First National Maintenance*, this Court referred to "petitioner's retained freedom to manage its affairs unrelated to employment." 452 U.S. at 677 (footnote omitted). Recognizing that "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business," *id.* at 678-79 (footnote omitted), this Court there implicitly held that management could implement certain fundamental business decisions even where those decisions "have a substantial impact on . . . employment." *Id.* In another context, this Court referred to "the

<sup>12</sup>As this Court recently explained,

Both employers and employees come to the bargaining table with rights under state law that form a "backdrop" for their negotiations . . . absent a collective-bargaining agreement, for instance, state common law generally permits an employer to run the work-place as it wishes. The employer enjoys this authority without having to bargain for it.

*Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2222 (1987). "The scope of the management's prerogative is often not spelled out in collective bargaining agreements, but the prerogative exists implicitly to some extent in all such agreements." *Rutland Ry. Corp. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 35 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964).

These principles apply equally under the RLA. *See, e.g., Texas & N.O. R.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 571 (1930) ("The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them."); *Rutland Ry. Corp. v. Brotherhood of Locomotive Engineers*, 307 F.2d at 21, 35 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Railroad labor arbitrations have long recognized that a carrier retains its management prerogatives to the extent that they have not been limited by agreement or by law. For example, in *System Federation No. 162 v. Southern Pacific Lines in Texas and Louisiana*, Award No. 3630, National Railroad Adjustment Board ("NRAB") 2d Div. (Jan. 9, 1961), the arbitrator explained as follows:

It is a fundamental principle of the employer-employee [sic] relation that the determination of the manner of conducting the business is vested in the employer except as its power of decision has been surrendered by agreement or is limited by law.

Similarly, in *BRAC v. Southern Pacific Transportation Co.*, Award No. 15, Public Law Board No. 843 (Aug. 30, 1984), the arbitrator stated:

We conclude that all inherent rights of management that the Carrier has not contracted away still remain with it. The carrier is free to exercise its managerial prerogatives unless its acts are limited by law or by the Agreement between the parties. We cannot, by interpretation, add a prohibition against managerial prerogatives which does not appear in the Agreement between the parties.

To the extent the "practices and customs of the railroads and their employees" help to determine what is bargainable, *see Tele-*

*graphers*, 362 U.S. at 338, these arbitration decisions demonstrate that, contrary to the contentions of RLEA and *amicus* AFL-CIO, management retains its right to exercise its prerogatives except to the extent a limitation on that right appears in a collective bargaining agreement.<sup>13</sup> The right to make and implement fundamental decisions regarding the scope and direction of the enterprise thus is part of the status quo, and the exercise of that right therefore does not violate the status quo.

#### B. The Loss Of Jobs That Results From A Management Decision, Approved By The ICC, Regarding The Scope And Direction Of The Business Does Not Violate The Status Quo

In *Shore Line*, this Court described the duty to maintain the status quo that takes effect whenever parties are involved in an RLA major dispute as follows:

The obligation of both parties during a period in which any of these status quo provisions is properly invoked is to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.

396 U.S. at 152-53. According to RLEA and the court of appeals, the "actual, objective working conditions and practices, broadly conceived" in effect at the time this dispute arose must include "the

<sup>13</sup>*See also BRAC v. Railroad Perishable Inspection Agency*, Award No. 23551, NRAB 3d Div. (March 10, 1982) ("Numerous awards of this Board have held that the carrier has the prerogative to determine when, where and by whom work will be performed. Unless prohibited by the negotiated agreement, it has the right to rearrange existing work assignments including the abolishment of unneeded positions."); *Transportation Communication Employees Union v. Soo Line R.R. Co.*, Award No. 19019, NRAB 3d Div. (Feb. 28, 1972) ("It is the right of an employer to abolish a position it has created unless to do so would be contrary to law or an agreement, express or implicit.").

very existence of the workers' jobs." RLEA Br. at 37. RLEA therefore concludes that the loss of jobs that would result if P&LE were to go out of business as a railroad would violate P&LE's status quo obligation.

As an initial matter it must be noted that whether or not the status quo includes "the very existence of the workers' jobs," it also includes: (1) P&LE's management prerogative to determine the scope and direction of its business; (2) collective bargaining agreements that concededly impose no restriction on P&LE's exercise of its management prerogative to abolish jobs no longer needed; (3) the Interstate Commerce Act, which vests exclusive authority to approve P&LE's decision to go out of business in the ICC; (4) rail labor's 50 year past practice of looking to the ICC to address the effects of transactions; and (5) an ICC decision authorizing P&LE to go out of business. Depriving P&LE of its pre-existing right to exercise its managerial prerogative is as much a change in the status quo as would be the loss of jobs "as well as . . . seniority and other contractual rights" on which RLEA relies. RLEA Br. at 39. RLEA's attempt to show a breach of the status quo fails, however, because incidental changes in working conditions, no matter how serious, that result from the exercise by management of its right to determine the scope and direction of its business do not violate the status quo. Moreover, the loss of jobs will not violate the status quo obligation that results from RLEA's own Section 6 notices because, unlike the union in *Shore Line*, RLEA is not trying to bring an "omitted case" into the written agreement, but rather is seeking to acquire protections and benefits that do not presently exist at all. RLEA has never suggested that P&LE ever agreed, implicitly or explicitly, to guarantee work or jobs. RLEA seeks to have the Court create job guarantees by reading them into the RLA itself.

RLEA characterizes P&LE's arguments as being identical to those rejected by this Court in *Shore Line*. The railroad in *Shore Line* was not, however, implementing an ICC-approved decision affecting the scope and direction of its business, but rather was simply changing an established run of the mill working condition,

i.e., the location at which employees reported to work. In rejecting the railroad's claim that the status quo had to be determined solely on the basis of written agreements, this Court noted that in the railroad industry the parties frequently leave mutually acceptable rules and working conditions out of their written agreements. 396 U.S. at 153-54.

In *Shore Line* the railroad could not rely on the contract's silence concerning the location at which employees were to report to work because there was, in fact, an historical practice regarding that working condition. In contrast, management's right to change the scope and direction of its business is so fundamental that, in the absence of an express contractual restriction on that right, the status quo permits its exercise.<sup>14</sup> The possibility that jobs could be lost as a result of P&LE's exercise of that right was always part of the status quo. Thus, while the loss of jobs that would result from P&LE's decision would change the employment status of the affected employees, that loss of jobs is not the sort of change in working conditions that violates the status quo.

On the other hand, P&LE is not precluded from eliminating the jobs by reason of RLEA's Section 6 notices because the status quo that is involved by virtue of those notices does not include any present restriction on P&LE's right to proceed. It is rail labor, not P&LE, that is seeking by those notices to change existing practices and agreements, see AFL-CIO Br. at 20, and in this respect this case is very different from *Shore Line*. There is nothing unfair or "one-sided" about allowing P&LE to proceed in these circumstances. Rail labor could have sought these contract changes at any time in the past, before P&LE decided to terminate its status as a railroad. P&LE's unions have been aware for at least five years

<sup>14</sup>It seems obvious that there can be no past practice of going out of business. An employer will exercise that right only once. The contracts themselves contain no limitation on that right. Consequently, there is no basis for the suggestion, see *United States Br.* at 26-27, that this case should be remanded for examination of the contracts and past practices where both parties to those agreements concede that the agreements do not cover this situation and as a matter of definition there is no past practice directly applicable.

that P&LE was in dire straits and might be sold.<sup>15</sup> Had P&LE's unions succeeded in obtaining these changes earlier, they would now be part of the existing agreements and hence part of the status quo that P&LE must observe. Having failed, for whatever reason, to seek and obtain these contract changes prior to P&LE's announcement, P&LE's unions cannot now be allowed to call "time out" in order to prevent P&LE from going forward while they belatedly pursue bargaining. The status quo provisions of the RLA were never meant to serve as an insurance policy for shortsighted labor representatives.

### III. RLEA'S MINIMUM STANDARDS ANALYSIS FAILS TO "MAKE SENSE" OF THE ICA AND THE RLA

RLEA argues that there is no conflict between its interpretation of the RLA and the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* ("ICA"), because the ICA is merely a form of "minimum standards legislation." RLEA Br. at 50. According to RLEA, the labor protective conditions imposed by the ICC pursuant to the ICA to address the effects on employees from ICC-regulated transactions are a "floor" binding upon carriers, but not on unions, who are free to accept the protections imposed by the ICC or to bargain for more generous benefits under the RLA. There is no basis in the ICA or its legislative history to support RLEA's minimum standards analysis. RLEA's minimum standards analysis also fails to reconcile the fundamental conflicts between the ICA and the RLA, as RLEA would have the RLA construed. Ironically, through its minimum standards analysis, RLEA proves P&LE's point that, in an ICC-regulated transaction, a carrier's employees are limited to their then existing collectively bargained protections and whatever labor protections are imposed by the ICC.

<sup>15</sup>For example, as demonstrated by P&LE President Gordon E. Neuenschwander's testimony, P&LE's employees agreed to certain concessions in the past to keep the railroad operating. J.A. 87-88.

### A. RLEA's Minimum Standards Analysis Is Not Supported By The ICA, Its Legislative History Or Any Judicial Or Administrative Precedent

RLEA's minimum standards theory is conceptually flawed at its outset, because the ICA does not simply fix a minimum standard for protective benefits, but grants the ICC broad discretion to fashion the level of labor protection appropriate in the different types of transactions subject to the ICC's exclusive jurisdiction. Even in those classes of transactions where Congress has established a minimum level, as in mergers, 49 U.S.C. § 11347, Congress has left to the ICC discretion to require greater protections in appropriate cases. *See, e.g., RLEA v. United States*, 675 F.2d 1248, 1256 (D.C. Cir. 1982). More significantly for this case, Congress has left the ICC complete discretion to determine what protections should be required, if any, in the sale of a rail line to a non-carrier pursuant to ICA Section 10901. In the exercise of that discretion, the ICC determined in *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd*, *Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) ("*Ex Parte No. 392*"), that no labor protections should be imposed on sales of marginal lines to new entrants, like Railco, absent a showing of exceptional circumstances by labor. *Id.* at 815. RLEA elected not to even attempt such a showing here. The fact that the ICC did not, therefore, impose any labor protective conditions did not mean that the ICC established a floor of zero protection. It meant that, in the absence of a showing by RLEA, the ICC's finding in *Ex Parte No. 392* that labor protection conditions would make the sale of marginal rail lines uneconomical, and lead to their abandonment, applied to this sale.

## B. Congress Did Not Intend The ICC To Implement Its Orders Through The RLA

### 1. The Procedures Of Section 11347 Do Not Apply Here

RLEA argues that the ICA and RLA are complimentary, because the ICC-prescribed labor protection conditions supposedly incorporate the RLA's notice and status quo requirements, and because Congress and the ICC have used RLA mandated bargaining to implement the "minimum standards" conditions. These RLEA claims do not withstand scrutiny. As a preliminary matter, RLEA's entire minimum standards analysis is premised on ICA provisions that have no application to this case. RLEA traces the ICA's provisions regarding a minimum level of labor protective conditions in railroad mergers and consolidations, 49 U.S.C. § 11347, from ERTA through the Washington Job Protection Agreement ("WJPA") to Section 11347 in its present form. These requirements, however, did not even have any application to the sale of lines to Railco, which, as RLEA itself recognizes, RLEA Br. at 64, was subject to Section 10901, not the ICA merger provisions.<sup>16</sup>

Furthermore, even when the ICC imposed discretionary labor protective conditions on Section 10901 line sales, those conditions did not require observance of the RLA's notice, bargaining and status quo requirements or that the purchaser assume the selling carrier's labor agreements. Typically, the ICC only imposed labor protective conditions on the selling carrier. The ICC's discretionary conditions, moreover, did not require the purchaser to negotiate

<sup>16</sup>ERTA authorized the coordinator to order mergers. The WJPA only applied to "coordinations" between railroads signatory to that agreement. Neither had any application to sales of rail lines to a non-carrier. Moreover, the WJPA has since been incorporated into the ICC's merger labor protective conditions and "[t]he absence of any separate enforceable validity of the WJPA conditions has thus been an accepted aspect of labor relations under the Interstate Commerce Act for a substantial period of time." *Maine Central R.R. Co., Georgia Pacific Corp., Canadian Pacific Ltd. and Springfield Terminal Ry. Co.--Exemption from 49 U.S.C. 11342 and 11343*, ICC Finance Docket No. 30502, (served Sept. 16, 1985), slip op. at 5, *aff'd*, *RLEA v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987).

with the seller's unions or preserve wages or working conditions that had prevailed on the selling carrier. The new carrier was free to select its own workforce and establish its own terms of employment.<sup>17</sup>

### 2. Section 11347 Labor Protections Are Not Implemented Through The RLA Bargaining Process

In any event, RLEA also incorrectly states that the labor protective conditions found by the ICC to satisfy Section 11347's minimum requirements incorporate the RLA notice, bargaining and status quo requirements or preserve collective bargaining agreements. The standard conditions imposed in mergers are the "New York Dock" conditions. *New York Dock Ry.--Control--Brooklyn E. Dist. Terminal*, 360 I.C.C. 60 (1979), *aff'd*, *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). The standard conditions imposed in trackage rights and leases, also subject to Section 11347, are the "Mendocino Coast" conditions. *Mendocino Coast Ry., Inc.--Lease and Operation--California Western R.R.*, 360 I.C.C. 653 (1980), *aff'd*, *RLEA v. United States*, 675 F.2d 1248 (D.C. Cir. 1982). While the *New York Dock* conditions incorporate the requirement of the now defunct Washington Job Protection Agreement that the involved carriers give 90-days advance notice of the approved transaction and that the carriers and unions execute an implementing agreement before the transaction can be consum-

<sup>17</sup> See, e.g., *Prairie Trunk Ry. Co.--Acquisition and Operation*, 348 I.C.C. 832, 852 (1977), *aff'd*, *Illinois v. United States*, 604 F.2d 519 (7th Cir. 1979) (ICC refuses to require purchaser to maintain wage agreements and bargain with seller's unions); *RLEA v. Durango & Silverton Narrow Gauge R.R.*, 363 I.C.C. 841 (1981), *aff'd*, *RLEA v. United States*, 697 F.2d 285 (10th Cir. 1983) (ICC refuses to require purchaser to bargain with seller's unions over selection of its workforce or continuation of agreements). Notwithstanding the ICC's refusal to further condition these sales as demanded by labor, the rail unions did not seek to enjoin them as violations of RLA notice, bargaining or status quo requirements, even though, after the sales, the rail lines were operated by different employees pursuant to different work rules and wages, as would have been the case had labor not blocked the sale to Railco.

mated, neither the conditions nor Section 11347 incorporates the statutory notice or status quo requirements of the RLA. Moreover, the negotiation of the implementing agreement is not pursuant to the RLA. If no agreement is reached within the 90-day period set by the *New York Dock* conditions, then an arbitrator appointed pursuant to those conditions imposes an agreement upon the parties. The arbitrator's decision is appealable to the ICC, *UTU v. Norfolk & Western Ry. Co.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 700 (1988), whose decision is in turn appealable to the courts of appeal, *IBEW v. ICC*, 862 F.2d 330, 334 (D.C. Cir. 1988). Thus, the voluntary negotiations and mandatory arbitration conducted pursuant to *New York Dock* conditions differ significantly from the RLA major dispute procedures, because *New York Dock* conditions ensure that disputes over labor protection will be resolved and the transaction not be held up or blocked altogether. To further illustrate the difference between ICA and RLA bargaining, under the *Mendocino Coast* conditions the involved carriers are only required to give 20 days advance notice and can consummate the transaction at the end of that time even if no implementing agreement has yet been formed.

RLEA is also incorrect when it asserts that the ICC's mandatory protections require that in Section 11347 transactions all collective bargaining agreements must be preserved. As the RLEA knows, the ICC and arbitrators have interpreted the *New York Dock* conditions to permit an ICC implementing agreement to alter

existing collective bargaining agreement rights as necessary to allow the transaction to be implemented.<sup>18</sup>

RLEA's reliance on the proviso to Section 11347, which authorizes carriers and unions to negotiate labor protective arrangements in mergers, as "conclusively" establishing that ICC protections are a floor for RLA bargaining is pure nonsense. RLEA Br. at 55. RLEA claims that this proviso somehow imports the notice, bargaining and status quo requirements of the RLA into ICA merger proceedings. RLEA further claims that P&LE ignores this provision under which, according to RLEA, "rail labor may require the carrier to negotiate for a protective arrangement . . . ." RLEA Br. at 56. As noted above, P&LE does not need to "escape" the force of Section 11347's proviso since Section 11347 does not apply to the sale of P&LE's lines to Railco. Even if it did apply the proviso, which states the parties "may" make a protective arrangement, it certainly does not by its terms "authorize[ ] rail labor to demand that the carrier negotiate." RLEA Br. at 61.<sup>19</sup> The proviso allows, but does not require, that carriers and unions involved in mergers negotiate a labor protective arrangement to be imposed by the ICC as a condition of its merger approval, in lieu of the labor protective conditions the ICC would otherwise impose.

<sup>18</sup>See, e.g., *UTU v. Norfolk & Western Ry. Co.*, 822 F.2d at 1121-23. See also *CSX Corp.--Control--Chessie System, Inc. and Seaboard Coast Line Indus.*, ICC Finance Docket No. 28905 (Sub-No. 22) (served June 23, 1988), *appeal pend'g*, *Brotherhood of Railway Carmen v. ICC*, No. 88-1724 (D.C. Cir. argument scheduled April 25, 1989); *Norfolk Southern Corp.--Control*, ICC Finance Docket No. 29430 (Sub-No. 20) (served June 10, 1988), *appeal pend'g*, *Am. Train Dispatchers Ass'n v. ICC*, No. 88-1694 (D.C. Cir. argument scheduled April 25, 1989). By flatly stating that, since 1976, the ICC's mandatory protections require the continuation of agreements, RLEA Br. at 65 n.45, RLEA may be inviting this Court to express an opinion on this issue, which is irrelevant to this case but is pending in the above cited appeals.

<sup>19</sup>RLEA also erroneously asserts that Congress "has authorized rail labor to demand that the carrier negotiate" in all the ICA provisions mandating labor protection. RLEA Br. at 61. Sections 10903(b)(2) and 10910(j), which mandate a minimum level of protection in, respectively, abandonments and feeder line sales, do not even contain a proviso such as found in Section 11347.

While the proviso has been in the statute since 1940, RLEA cites no authority for its novel construction for the simple reason there is none. Indeed, the ICC rejected RLEA's construction of Section 11347 long ago. For example, in *St. Louis Southwestern Ry.--Purchase--Alton & Southern R.R.*, 342 I.C.C. 498, 521 (1972), the ICC refused RLEA's "request that we direct the applicants to negotiate protective agreements for the benefit of affected employees . . .," explaining that:

[t]he employees have the right under Section 5(2)(f) [now § 11347] to negotiate the type of protection they desire, but this is a voluntary action. Under Section 5(2)(f), however, they have no absolute right that would require us to direct the carrier or carriers to negotiate a protective agreement.

*Accord, Illinois Central Gulf R. Co.--Acquisition--Gulf, Mobile & Ohio R.R. Co.*, 338 I.C.C. 805, 862 (1971) ("[Section 11347] does not create in the employees an absolute right to negotiated protection.").<sup>20</sup>

<sup>20</sup>RLEA cites several ICC merger decisions where the carrier and unions entered voluntary merger protective agreements providing for protections in excess of the statutory minimum. RLEA Br. at 52. In none of these cases, however, were the carriers compelled to negotiate the agreement. The carriers entered these agreements voluntarily in order to obtain labor's support for the merger. In other merger cases, and in all recent ones, the carriers and unions have not negotiated voluntary merger protective arrangements. Instead, unions have petitioned the ICC to impose protections greater than the standard protection in merger cases. Even though the ICC determined that its standard conditions were adequate in these cases, the unions never asserted a right to compel bargaining under Section 11347 or under the RLA for protections more generous than the ICC applied; nor did labor seek to enjoin these transactions as violative of the RLA. See, e.g., *Guilford Transportation Indus.--Control--D&H Ry. Co.*, 366 I.C.C. 396, 405 (1982) (no exceptional circumstances to warrant greater protections); *Norfolk & Western Ry. Co.--Purchase--Illinois Terminal R.R.*, 363 I.C.C. 882, 889-90 (1981); *CSX Corp.--Control--Chessie System, Inc. and Seaboard Coast Line Indus.*, 363 I.C.C. 518, 590 (1980) (ICC declines union request for extended protective period and greater relocation benefits); *Missouri Pacific R.R.--Merger--The T&P Ry. Co.*, 348 I.C.C. 414, 429-30 (1976) (no basis for attrition-type conditions); *Chesapeake & Ohio*

RLEA's whimsical notion that the ICA incorporated the RLA's notice, bargaining and status quo requirements is directly refuted by the legislative history of Section 11347. In ERTA, Congress expressly preserved labor's RLA rights, even though it preempted other laws that might interfere with a railroad merger ordered under ERTA. Section 10 provided that "nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." 48 Stat. 215. During consideration of legislation to replace ERTA, legislation which ultimately took the form of the 1940 Transportation Act, 54 Stat. 898, Commissioner Eastman recommended that this same proviso be incorporated into new legislation. Contrary to RLEA's erroneous assertion, RLEA Br. at 56, Congress expressly rejected that recommendation. P&LE Br. at 41 & n.24.

Indeed, to leave merger protective arrangements solely to RLA bargaining would have completely frustrated the 1940 Act by allowing rail unions to block rail mergers. For this reason, the Sixth Circuit rejected any notion that the RLA governed a merger protective agreement negotiated under Section 11347 in *Nemitz v. Norfolk & Western Ry. Co.*, 436 F.2d 841, 845 (6th Cir.), *aff'd*, 404 U.S. 37 (1971) ("Since, under the [RLA], employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the [RLA] to situations such as that presented here, like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore should not be applied."). This Court's affirmance recognized that voluntary protective agreements were formed pursuant to the "machinery" of the ICA, not the RLA,

*Ry.--Control--B&O R.R.*, 317 I.C.C. 261, 285-88 (1962) (ICC refuses union requests for attrition-type conditions).

had to be reviewed by the ICC, and became part of the ICC's order. 404 U.S. at 43.<sup>21</sup>

Thus, RLEA has failed to show that the ICC's labor protective conditions incorporate or somehow reflect the RLA's major dispute procedures. RLEA's review of the ICA, while replete with error, does confirm that unions have historically looked solely to the ICC to address the impact on labor from ICC-approved transactions and, if dissatisfied with the level of protections imposed by the ICC, they have exercised their right to appeal the ICC decision or have lobbied Congress to amend the ICA to require greater protections. For example, RLEA concedes that when the ICC failed to require sufficiently generous protective benefits, "rail labor returned to Congress . . . for amendment of the ICA's labor protection provisions." RLEA Br. at 53. RLEA offers no explanation why, if the ICC protections were merely a "floor" and not a "ceiling," and "rail labor should have a right to devise its own solutions to the impact of ICC-regulated transactions on employees," *id.* at 54, rail labor during the last 50 years did not simply serve Section 6 notices demanding greater protections, as in this case, and insist that RLA status quo requirements be observed until the RLA's bargaining, mediation and cooling off procedures had been exhausted. Labor's failure certainly cannot be explained away as satisfaction with ICC-formulated labor protective conditions. RLEA's own brief chronicles its dissatisfaction with ICC-prescribed protections.<sup>22</sup> RLEA Br. at 52-53. While RLEA suggests that labor "began to negotiate new [protective] arrangements" when the ICC failed, in

<sup>21</sup>The ICC has held that it has the power to modify negotiated protective agreements if it finds that exceptional circumstances justify modification. *See, e.g., Norfolk & Western Ry. Co. and N.Y.C. & St. L. R.R.--Merger*, 347 I.C.C. 506, 512 (1974).

<sup>22</sup>To put RLEA's dissatisfaction in perspective, it should be noted that the ICC labor protective conditions provided for wage guarantees of up to six years for affected employees, even if there was no railroad work for them. *See, e.g., RLEA v. United States*, 675 F.2d 1248, 1251 (D.C. Cir. 1982). RLEA evidently is not satisfied unless the ICC requires attrition-type conditions, *i.e.*, no employees can be affected.

labor's eyes, to provide adequate protections, those arrangements were negotiated, not under the RLA, but pursuant to the ICA, and only in railroad merger cases when the railroad agreed to negotiate, as P&LE has previously explained.

### C. RLEA's Suggested Accommodation Of The Relevant Statutes Frustrates National Transportation Policy

In the final analysis, RLEA has failed to explain how the illogical results of its minimum standards analysis "'make sense' in combination," of the ICA and RLA. *United States v. Fausto*, 108 S. Ct. 668, 676 (1988). For example, under the logic of RLEA's harmonization of the two statutes, unions could petition the ICC for labor protections and, after the conclusion of ICC proceedings, even if mandatory protections were imposed, *e.g.*, because the transaction was subject to Section 10903(b)(2) or Section 11347, rail labor could then simply serve a Section 6 notice proposing different conditions than those required by the ICA or the ICC and insist that the transaction not be consummated until exhaustion of the RLA's "purposely long and drawn out" procedures.

The affected carrier would find itself in the same position as does P&LE. It must either agree to the new conditions or forego the transaction. Moreover, at the end of the RLA bargaining procedures, the union could strike if still not fully satisfied, or because it simply opposed the transaction altogether. Here, for instance, RLEA did not even avail itself of the opportunity to request discretionary protections; it opposed the sale through the strike weapon and with RLA litigation. Similarly, a union could participate in an arbitration under the ICC conditions, and, if dissatisfied with the result, strike.<sup>23</sup>

In *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 107 S. Ct. 1841 (1987), this Court held that after exhaustion of the RLA bargaining process rail labor has extraordi-

<sup>23</sup>Lest this seem outlandish, RLEA took this position before this Court in its petition for a writ of certiorari from *UTU v. Norfolk & Western Ry. Co.*, 822 F.2d at 1114, Pet. for Writ of Certiorari at 20-21, No. 87-689 (filed Oct. 28, 1987).

nary weapons including the right to engage in secondary picketing. It "makes no sense" that Congress intended that rail labor can use this extraordinary strike weapon, or its threat, against carriers involved in an ICC-approved transaction, or against the entire railroad industry, or even airline industry as well, if dissatisfied with that transaction. Neither RLEA nor the United States explains why rail labor, unlike any other group affected by ICC decisions, is not bound by the ICA procedures, particularly when Congress has provided rail labor with an extraordinary remedy, the ability to seek labor protective conditions under the ICA. *Cf. ICC v. Brotherhood of Locomotive Engineers*, 107 S. Ct. 2360, 2377-78 & n.15 (1987) (Stevens, J., concurring)(four Justices find unions which failed to present claimed RLA rights in ICC proceedings slept on their rights). Contrary to RLEA's complaint, the ICA process is not "one-sided" and "uneven" simply because labor does not always obtain all that it asks from Congress or the ICC.<sup>24</sup> Furthermore, contrary to RLEA's implication, meaningful judicial review of the ICC's labor protection decisions, as with all ICC orders, is available. 28 U.S.C. § 2342(5). RLEA does not explain why judicial review is inadequate for labor, when all others unhappy with an ICC order are limited by statute to this remedy. Moreover, neither RLEA nor the United States explains why, if Congress intended the RLA as the process by which labor would obtain benefits addressing the effects of ICC-regulated transactions, it was necessary to establish a "floor" for such bargaining, especially when, in the case of mandatory protections, that "floor" consists of protections unprecedented in American industry. It is RLEA's position that is truly "one-sided," because under RLEA's view, only carriers are bound by the mandatory or discretionary labor protection "floor" required by the ICC, while labor would be free to bargain on the upside, with no downside below that floor.

<sup>24</sup>For example, RLEA complains the ICC has never imposed discretionary labor protections in an *Ex Parte No. 392* transaction. RLEA does not say, however, whether labor has ever tried to show the required exceptional circumstances in these sales. It did not make such an effort here.

Contrary to the assertion of RLEA and the United States, the conclusion that Congress intended rail labor to look to the ICC to obtain labor protective conditions does not "repeal by implication" the statutory text of the RLA. As P&LE has explained, nothing in that text gives unions the right to insist that carriers forego management decisions subject to the ICA until the RLA's bargaining processes are exhausted. Thus, the repeal by implication doctrine does not apply here. At most, this case presents a question of accommodation, and P&LE presents a proper accommodation of the RLA and ICA. When a railroad is a going concern, labor can exercise its RLA rights to bargain over rates of pay, rules and working conditions. However, when the railroad decides to go out of business as a carrier, labor must petition the ICC to obtain labor protection beyond that contained in existing agreements. If that carrier's operations are taken over by a new company, then the employees' bargaining and representation rights with the new employer are again fully subject to the RLA. This accommodation gives effect to the purposes of both the ICA and RLA, while RLEA would effectively nullify the ICC's ability to implement the policies and purposes of the ICA.

#### IV. THE DISTRICT COURT'S INJUNCTION WAS A COLLATERAL ATTACK UPON THE ICC'S JURISDICTION AND ORDERS

RLEA argues that the district court's injunction was not a collateral attack because the ICC merely exempted P&LE's purchaser, Railco, from the filing requirements of Section 10901 and because the ICC does not have jurisdiction to enforce the RLA. However, as previously shown, the ICC had exclusive jurisdiction over the sale, including the effects on employees and to address all of the relief P&LE's unions were seeking in their Section 6 notices. Therefore, the district court injunction was a collateral attack upon the ICC orders approving the sale and allowing it to go forward on an expeditious basis without the imposition of labor protective conditions.

Additionally, the ICC's exemption order did not merely excuse Railco from Section 10901's filing requirements. Because that exemption was required by the ICC before P&LE could sell its rail lines, it was the functional equivalent of an approval under Section 10901. Railco had to obtain either a certificate of public convenience and necessity under Section 10901 or an exemption from that requirement. Moreover, even though the ICC acted by way of its exemption authority, pursuant to Section 10505, the ICC retained jurisdiction over the sale and its broad authority to impose conditions upon that sale. *See, e.g., Ex Parte No. 392*, 1 I.C.C. 2d at 812 ("the potential for total or partial reimposition of regulation is always present.").<sup>25</sup> Indeed, in the ICC's September 25, 1987 Order refusing to stay the sale, the ICC, at RLEA's request, conditioned the sale upon the requirement that P&LE retain its corporate existence until after the ICC had considered RLEA's petition to revoke Railco's exemption. RLEA's brief does not even mention this ICC order, which was clearly vacated as a practical matter by the district court injunction.

#### V. THE NORRIS-LA GUARDIA ACT DOES NOT PROHIBIT AN INJUNCTION AGAINST AN ILLEGAL STRIKE

It is true, as RLEA and *amicus* AFL-CIO assert, that the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* ("NLGA"), withdrew from federal courts the ability to prohibit strikes arising out of labor disputes. 29 U.S.C. § 104. This court has long held, however, that the NLGA, like any other statute, must be accommodated to other legislative schemes. A proper accommodation of NLGA with the ICA and the RLA demonstrates that the district court was correct when it enjoined the strike on ICA grounds and it would have been

<sup>25</sup>Moreover, the fact that the ICC exercises its Section 10505 exemption authority does not create a void to be filled by other federal or state law. The ICC retains jurisdiction and any requests for relief must be presented to the ICC. *See, e.g., G&T Terminals, Inc. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1234-35 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1291 (1988).

correct to enjoin it on the alternative RLA ground. *See* P&LE Br. at 56-66.

First, P&LE had no duty whatsoever to bargain with its unions since the notices were a transparent attempt to bargain over the decision itself. *See Japan Air Lines Co. v. IAM*, 538 F.2d 46, 52 (2d Cir. 1976). However, even if P&LE has a duty to bargain over the effects of its non-bargainable decision, under the RLA the parties are prohibited from utilizing self-help until the bargaining process is exhausted. *Local 553, Transport Workers Union v. Eastern Air Lines, Inc.*, 695 F.2d 668, 674 (2d Cir. 1988). Thus, in either situation, the unions' strike could be properly enjoined as a violation of the RLA.

The strike was also enjoinable as a violation of the ICA. P&LE Br. at 56-64. In enacting the ICA, Congress created a complete set of administrative procedures by which labor organizations, like other parties, can petition the ICC for special protective provisions. If those protections are insufficient, they can appeal ICC actions to a federal court. Further, if conditions are imposed, disputes over their meaning are resolved by ICC arbitrations. The ICA is replete with the type of administrative remedies that this Court has ruled are important enough to take precedence over the NLGA. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). Therefore, the strike by P&LE's unions was properly enjoinable on at least two grounds, neither of which conflicted with the NLGA's policy or goals.

#### VI. P&LE'S TAKINGS CLAUSE CLAIM IS NOT DEFEATED BY THE FACT THAT RAILROADS ARE SUBJECT TO ICC REGULATION

RLEA asserts that the fact that P&LE is subject to regulation and restrictions on its ability to exit the rail industry as desired is the "death knell" for P&LE's takings claim. RLEA Br. at 22 n.16. RLEA's cursory treatment of P&LE's claim fails to address the issues raised by P&LE's Opening Brief and is, therefore, unpersuasive. Indeed, as the United States indicates, the RLA and any obligations arising thereunder should be construed to avoid the

possibility of an unlawful taking of property in this case.<sup>26</sup> United States Br. at 28. However, while waiting for the court order to be either properly limited or reversed, P&LE continues to lose money, its assets continue to erode, and its rights in its property are improperly restricted. See P&LE Br. at 66-70.

RLEA is correct that a reasonable delay in the implementation of a regulatory program must be tolerated. RLEA Br. at 22 n.16. However, as this Court has noted, there is a point where the loss of property becomes "unreasonable even in light of the public interest" served by requiring the carrier to remain in business. *Regional Railroad Reorganization Act Cases*, 419 U.S. 102, 124 (1974). There are constitutional limitations on the delay to which a carrier going out of business can be subjected. The delay associated with the ICC approval may have been constitutionally permissible. However, the district court injunction granted RLEA total control of the transaction because, until the unions agree to the terms of a prospective sale, P&LE is forced to engage in RLA bargaining which "bleed[s] away [its] resources in a continuing status quo while hope[s] of preserving any service, or any jobs, seep[ ] away." *RLEA v. P&LE*, App. II at 61a (Hutchinson, J., dissenting). Meanwhile, its unions have absolutely no incentive ever to reach agreement, because that would spell the end of their members' jobs with P&LE. See *First National Maintenance*, 452 U.S. at 681. Thus, the "point" at which the delay referred to by this Court becomes unreasonable has been reached in this case and the improper implementation of RLA bargaining obligations has taken P&LE's property in violation of the Fifth Amendment.

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<sup>26</sup>The United States is incorrect in asserting that the factual record is not sufficiently developed to support P&LE's takings argument. United States Br. at 28. The record in this case is replete with references to P&LE's precarious financial condition and the detrimental effect that the court-ordered bargaining had on that condition. See, e.g., J.A. 16, 22, 29, 70, 82-83, 131, 143-44, 168, 191; Petitioner's Supplemental Brief at App. C (filed Nov. 22, 1988); see also *RLEA v. P&LE*, App. II at 61a-62a (Hutchinson, J., dissenting). Indeed, the only question raised by RLEA was not whether P&LE's financial distress was genuine, but whether P&LE was already insolvent. Therefore, the record is sufficiently developed for this Court to address P&LE's claim that its property has been taken by virtue of the court order.

## CONCLUSION

Failing in Congress and in the courts of appeals to reverse the ICC's post-Staggers Act policies, RLEA has embarked on a course of RLA-based litigation whose purpose is to give RLEA the right to veto ICC transactions where it is dissatisfied with the manner in which the ICC exercises its discretion. RLEA's attempt to disrupt the ICC process and turn back the economic consequences of lessened regulation through the unprecedented assertion and expansion of RLA bargaining rights should not be countenanced. National transportation policy must continue to be determined by Congress and the ICC, not by RLEA and the RLA. The judgments in Nos. 87-1589 and 87-1888 should be reversed.

Respectfully submitted,

G. Edward Yurcon  
THE PITTSBURGH & LAKE  
ERIE RAILROAD  
COMPANY  
780 Commerce Court  
Four Station Square  
Pittsburgh, Pennsylvania 15219  
(412)263-3806  
Counsel for Petitioner

Richard L. Wyatt, Jr.\*  
Ronald M. Johnson  
Charles L. Warren  
AKIN, GUMP, STRAUSS,  
HAUER & FELD  
1333 New Hampshire Ave., N.W.  
Suite 400  
Washington, D.C. 20036  
(202)887-4000  
Counsel for Petitioner

\* Counsel of Record

March 22, 1989

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Supreme Court, U.S.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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PITTSBURGH & LAKE ERIE  
RAILROAD COMPANY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE

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CHARLES FRIED  
*Solicitor General*

THOMAS W. MERRILL  
*Deputy Solicitor General*

JEFFREY P. MINEAR  
*Assistant to the Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*

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25/92

## QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission's authorization of a rail line acquisition by a non-carrier: (a) relieves the selling railroad of any obligation to bargain with its employees under the Railway Labor Act concerning the sale; and (b) relieves the courts of the provisions of the Norris-LaGuardia Act prohibiting injunctions in cases involving labor disputes.

2. Whether the Railway Labor Act requires a railroad to postpone a sale of its rail lines to a non-carrier until the railroad has completed bargaining with its unions concerning the unions' proposed changes in the existing collective bargaining agreements that would address the effects of that sale.

3. Whether a court order requiring a railroad to continue its operations while it is bargaining under the Railway Labor Act violates the Fifth Amendment's prohibition against the taking of property without just compensation.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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Nos. 87-1589 and 87-1888

PITTSBURGH & LAKE ERIE  
RAILROAD COMPANY, PETITIONER

*v.*

RAILWAY LABOR EXECUTIVES' ASSOCIATION

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

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**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE**

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

**STATEMENT**

The Pittsburgh & Lake Erie Railroad Company (P&LE) petitions for writs of certiorari to review two related court of appeals decisions arising from P&LE's dispute with its labor unions over the railroad's proposed sale of its rail assets. The first petition, No. 87-1589, seeks review of a court of appeals decision holding that Section 4 of the Norris-LaGuardia Act, 29 U.S.C. 104, prohibits the courts

from enjoining a labor strike arising from the railroad's sale of rail lines to another company in a transaction authorized by the Interstate Commerce Commission (ICC). The second petition, No. 87-1888, seeks review of a subsequent decision by the same court of appeals holding that P&LE must first bargain with its unions over the effects of the railroad's proposed sale of its rail lines, pursuant to the provisions of the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, before completing the sale.

1. P&LE is a small railroad that owns and operates 182 miles of rail line in western Pennsylvania and eastern Ohio. P&LE has experienced financial difficulties and, on July 8, 1987, it entered into an agreement to sell its rail lines to P&LE Railco, Inc. (Railco), a newly formed company that intended to operate those lines with a reduced contingent of employees. Railco's acquisition of P&LE's rail lines was subject to the ICC's approval in accordance with the Interstate Commerce Act (ICA), 49 U.S.C. (& Supp. III) 10101 *et seq.*<sup>1</sup> See 87-1589 Pet. App. A2-A3; 87-1888 Pet. App. 11a-13a.

When informed of the proposed sale, P&LE's unions requested the railroad to serve notices under Sec-

<sup>1</sup> The ICA establishes a national transportation policy to promote efficient, competitive carriage of goods and persons (49 U.S.C. 10101, 10101a) and creates the ICC to implement that policy (49 U.S.C. (& Supp. III) 10301 *et seq.*). The ICA grants the ICC broad jurisdiction over various forms of transportation, including rail carriage (49 U.S.C. 10501), and gives the ICC power to exempt carriers from ICA regulation (49 U.S.C. 10505). The ICA specifically regulates, *inter alia*, the construction and operation (49 U.S.C. 10901) or abandonment (49 U.S.C. 10903) of rail lines and the combination (including consolidation, merger and acquisition of control) of rail carriers (49 U.S.C. 11341 *et seq.*).

tion 6 of the RLA, 45 U.S.C. 156, and to commence collective bargaining with the unions over the effects on labor of its decision to discontinue its railroad business. P&LE responded that it had no duty to bargain under the circumstances. The unions then served Section 6 notices proposing changes to their collective bargaining agreements to give the employees greater protection in the event of a sale. The Railway Labor Executives' Association (RLEA), on behalf of P&LE's unions, thereafter brought an action in the United States District Court for the Western District of Pennsylvania to enjoin the sale and to force P&LE to bargain. On September 15, 1987, the unions commenced a general strike of the P&LE. See 87-1589 Pet. App. A3-A4; 87-1888 Pet. App. 11a-14a.

On September 19, 1987, Railco filed a "notice of exemption" with the ICC seeking exemption from the ICA approval process under the ICC's "non-carrier" exemption regulations. See *Ex Parte No. 392 (Sub-No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), review denied mem. *sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).<sup>2</sup> Under *Ex Parte No. 392*, an ex-

<sup>2</sup> The ICA generally provides that a party may acquire a rail line only if the party first obtains ICC approval. See 49 U.S.C. 10901. However, the ICC is empowered to exempt a person, class of persons, or transaction from the Section 10901 approval process if it finds that ICC oversight is "not necessary to carry out" the national rail transportation policy and the transaction or service is of "limited scope" or the application of the relevant statutory provisions is "not needed to protect shippers from the abuse of market power" (49 U.S.C. 10505(a)). In 1985, the ICC established a blanket exemption for Section 10901 acquisitions by "non-carriers" (*i.e.*, new

emption becomes effective and the transaction may be carried out seven days after the filing of a notice by the acquiring entity unless a petition to revoke the exemption has been filed and granted or the transaction is stayed by the ICC. See *ibid.*; 49 C.F.R. Pt. 1150.<sup>3</sup> On September 25, 1987, the ICC denied RLEA's request for a stay, and on October 2, 1987, RLEA filed a petition to revoke Railco's exemption, which remains pending before the agency. See 87-1589 Pet. App. A4; 87-1888 Pet. App. 10a-14a.

Meanwhile, P&LE requested the district court to enjoin the RLEA general strike on the ground that the work stoppage was an illegal attempt to interfere with the ICC's exclusive jurisdiction over Railco's purchase of the rail line. The court ultimately agreed and issued an injunction. See 87-1589 Pet. App. B1-B10. The RLEA appealed, and the court of appeals summarily reversed the district court's decision. See *id.* at A1-A13 (*P&LE I*). The court held that Section 4 of the Norris-LaGuardia Act deprived the district court of jurisdiction to issue the injunction, rejecting P&LE's contention that the Norris-LaGuardia Act must be accommodated to the ICA, and remanded the case for a determination whether P&LE was obligated to comply with the RLA bargaining procedures. P&LE then petitioned this Court, in No. 87-1589, for a writ of certiorari to review that decision.

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entrants into the railroad business), the so-called *Ex Parte No. 392* exemption. See 1 I.C.C.2d 810.

<sup>3</sup> On February 29, 1988, the ICC modified the *Ex Parte No. 392* exemption procedures to extend the notice periods and delay the effective date of the exemptions involving line sale transactions that result in the creation of larger railroads. 53 Fed. Reg. 5981.

2. On remand, the district court held that P&LE was obligated to bargain under the RLA concerning the effects of the proposed sale on its employees and enjoined the sale "to the extent that such sale does not include provisions for the maintenance of the status quo" (87-1888 Pet. App. 71a-85a). P&LE appealed, and the court of appeals affirmed the district court's decision. See *id.* at 1a-70a (*P&LE II*). The court of appeals concluded that the RLA required P&LE to bargain with its unions over the effects on labor of the railroad's proposed sale of assets and that the RLA's "status quo" provisions prohibited P&LE from completing the sale and eliminating any workers' employment during the bargaining process (*id.* at 16a-26a). The court rejected the contention that the ICC's exemption of P&LE's proposed sale from the requirements of the ICA relieved the railroad of its bargaining obligations (*id.* at 26a-57a). Judge Hutchinson dissented, concluding that "the RLA and the ICA are inherently contradictory in this respect and that Congress intended the ICA to prevail" (*id.* at 61a). P&LE petitioned this Court, in No. 87-1888, for a writ of certiorari to review the court of appeals' decision.<sup>4</sup>

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<sup>4</sup> The court of appeals recently entered yet another decision arising from the RLEA's objections to P&LE's proposed sale of its rail assets. See *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, No. 87-3853 (3d Cir. Oct. 14, 1988) (*P&LE III*). The RLEA had brought a state court action seeking to enjoin P&LE's sale on the ground that it violated the Pennsylvania Fraudulent Conveyance Act, Pa. Stat. Ann. tit. 39, §§ 351-363 (Purdon 1954), and P&LE removed the action to federal court. The court of appeals held that removal was improper and instructed the district court to remand the case to the state court. No issue regarding this decision is presented by any of the petitions filed in this Court.

## DISCUSSION

The United States submits that P&LE's petitions for writs of certiorari provide an appropriate opportunity for this Court to determine several questions of great importance to the railroad industry. The petition in No. 87-1888 squarely presents the question whether the ICC's authorization of a non-carrier's acquisition of existing rail lines relieves the selling railroad of any RLA obligation to bargain with its employees concerning the sale.<sup>5</sup> That petition also presents the question of the scope of the railroad's and the unions' bargaining and status quo obligations, an issue that would be reached if the Court determines that the ICC's authorization does not relieve the railroads of the RLA requirements. The petition in No. 87-1589 presents another significant related question; namely, whether, in the case of rail line sales, the ICC's authorization relieves the courts of the Norris-LaGuardia Act's prohibitions against injunctions in cases involving labor disputes. The determination of these issues, which have generated substantial disagreement among the lower courts, would provide significant assistance in resolving numerous pending disputes between the railroads and their unions over rail line sales.

<sup>5</sup> The ICC, which intervened through its own lawyers in the second court of appeals proceeding, has also filed a petition for a writ of certiorari seeking review of the court's determination that the ICA does not supersede the RLA. See *ICC v. Pittsburgh & Lake Erie R.R.*, No. 88-217 (filed Aug. 5, 1988). The Solicitor General has filed a brief amicus curiae expressing the United States' view that the ICC's petition should be dismissed because the ICC lacked statutory authority to participate in the court of appeals proceeding and to file the petition for writ of certiorari. See U.S. Amicus Br., *ICC v. Pittsburgh & Lake Erie R.R.*, No. 88-217.

1. Since the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, the ICC has encouraged the nation's railroads to sell, rather than to abandon, less profitable regional rail lines. The ICC has recognized that sale of these rail lines in lieu of abandonment frequently provides business opportunities for new, smaller, and more efficient carriers while preserving local rail service and related employment opportunities. An entity seeking to acquire a rail line must obtain ICC approval pursuant to the ICA (49 U.S.C. 10901), and the ICC has the discretion to condition its approval on the provision of measures to protect affected rail employees (49 U.S.C. 10901(c)(1)(A)(ii), (e)). Since 1982, the ICC generally has declined to provide such protection on the ground that it would effectively foreclose the formation of new rail carriers and would ultimately lead to further loss of jobs through the abandonment and dismantling of marginal rail lines. See 87-1888 Pet. App. 110a-111a. The ICC also has encouraged the trend toward sale rather than abandonment of rail lines through the development of a streamlined process—the *Ex Parte No. 392* class exemption—for prompt regulatory allowance of those transactions. See note 2, *supra*.<sup>6</sup>

P&LE elected to sell, rather than to abandon, its rail assets through a rail line transaction that would be governed by the *Ex Parte No. 392* class exemption. P&LE, like a number of other railroads and the ICC itself, maintains (87-1888 Pet. 11-17) that the ICC's grant of the class exemption to an acquiring company,

<sup>6</sup> In issuing *Ex Parte No. 392*, the ICC indicated that rail labor could file a petition under 49 U.S.C. 10505(d) to revoke the exemption in a particular transaction if exceptional circumstances justified labor protection. 1 I.C.C.2d 810, 815 (1986).

coupled with the ICC's decision to forgo the imposition of labor protective conditions, relieves the selling railroad of any obligations it might otherwise have to bargain with affected employees pursuant to RLA. The Third Circuit rejected that reasoning (87-1888 Pet. App. 26a-56a). The Fifth Circuit, in a similar context, has rejected that contention as well. See *Railway Labor Executives' Ass'n v. City of Galveston*, 849 F.2d 145, 149-152 (1988), petition for cert. pending, No. 88-517 (filed Sept. 26, 1988). The Eighth Circuit, however, has reached a contrary result. See *Railway Labor Executives' Ass'n v. Chicago & N.W. Transp. Co.*, 848 F.2d 102 (1988), petition for cert. pending, No. 87-2049 (filed June 14, 1988).

The United States has not endorsed the proposition, advocated by P&LE and supported by the ICC, that the grant of an *Ex Parte No. 392* exemption relieves the selling railroad of any RLA obligations that it might have toward employees affected by the exempted transaction.<sup>7</sup> We nevertheless agree that the question is important, and that P&LE's petition for a writ of certiorari in No. 87-1888 provides an appropriate opportunity for the Court to resolve the conflict among the circuits on this question. The Third Circuit's *P&LE II* decision provides a better vehicle for review than the Fifth Circuit's *City of*

<sup>7</sup> The ICC has set forth its views on the general question in its decision in *FRVR Corp.—Exemption Acquisition and Operation—Certain Lines of Chicago and North Western Transportation Co.—Petition for Clarification*, ICC Finance No. 31205 (Jan. 28, 1988), review pending *sub nom. Railway Labor Executives' Ass'n v. ICC*, No. 88-1280 (8th Cir.), which is reproduced in 87-1888 Pet. App. 109a-129a. The United States will set forth its views on the merits of this question through a brief *amicus curiae* if the petition in this case is granted.

*Galveston* decision because the latter decision to a large extent merely adopts by reference the reasoning of the former. And the Third Circuit's *P&LE II* decision provides a better vehicle for review than the Eighth Circuit's decision in *Chicago & N.W. Transp. Co.* because the latter decision, unlike the decision below, does not address the scope of the RLA bargaining and status quo obligations. Thus, as we explain in the following section, if the Court grants the petition in *P&LE II* and concludes that the grant of an *Ex Parte No. 392* exemption does *not* relieve the railroad of its RLA obligations, the Court can proceed to address the scope of those obligations, rather than to remand the case for further proceedings on that question.<sup>8</sup>

<sup>8</sup> The United States disagrees with respondent RLEA's suggestion (87-1888 Br. in Opp. 4) that this Court should resolve the issue through the grant of the petition for a writ of certiorari in *Railway Labor Executives' Ass'n v. Guilford Transp. Indus., Inc.*, No. 87-1911 (filed May 23, 1988). That case involves a transaction governed by Section 11341 of the ICA, which (unlike Section 10901) explicitly provides that carriers participating in transactions approved or exempted thereunder are "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction \* \* \*" (49 U.S.C. 11341(a)). See generally *ICC v. Brotherhood of Locomotive Engineers*, No. 85-792 (June 8, 1987), slip op. 9-17 (Stevens, J., concurring). Thus, the principles that govern transactions subject to Section 11341 are not necessarily applicable to transactions subject to Section 10901 and the *Ex Parte No. 392* class exemption.

The United States also disagrees with respondent RLEA's suggestion (87-1888 Br. in Opp. 5) that this case may become moot insofar as P&LE no longer intends to sell its assets to Railco and is presently seeking another purchaser. The court of appeals concluded, based on P&LE's continuing attempts to find another buyer that would qualify for an *Ex Parte No.*

2. P&LE's petition in No. 87-1888 also challenges the court of appeals' determination that the RLA itself requires the railroad to bargain with its unions over the effects of its proposed transaction and that the RLA's status quo provisions prohibit effectuation of the transaction during the bargaining process. Those questions, which are not dispositively answered by this Court's past decisions, involve matters of fundamental importance to labor-management relations in the railroad and airlines industries.<sup>9</sup> The United States suggests that if this Court has occasion to reach those issues in this case, it should decide them.

The Railway Labor Act establishes an elaborate mechanism designed to encourage the peaceful resolution of labor disputes likely to disrupt interstate commerce. Section 2 (First) imposes a basic duty on carriers and their employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise" in order to avoid interruption to commerce or to carrier operations (45 U.S.C. 152 (First)). Section 2 (Seventh) further provides that no carrier "shall change the

<sup>392</sup> exemption and the ICC's apparent willingness to grant such an exemption, that "each party continues to retain a 'legally cognizable interest in the outcome,' thus insuring a 'sufficient functional adversity' between the parties to justify the invocation of our jurisdiction" (87-1888 Pet. App. 15a-16a n.8 (citation omitted)). Indeed, P&LE's success in finding an alternative purchaser may well turn on resolving the legal uncertainty that has resulted from the Third Circuit's *P&LE II* decision.

<sup>9</sup> Both railroads and airlines are subject to the provisions of the RLA. See 45 U.S.C. 151-163, 181.

rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in [Section 6 of the RLA]" (45 U.S.C. 152 (Seventh)).

Section 6 of the RLA provides that carriers and employee representatives must "give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions" and must promptly agree to the time and place for the beginning of conferences to bargain over the proposed changes (45 U.S.C. 156). The parties may invoke the services of the National Mediation Board to assist in resolving their differences (45 U.S.C. 155). Once "such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier" (45 U.S.C. 156) until the negotiation, mediation, and cooling-off periods (including that associated with a Presidential Emergency Board, if one has been established) have expired (45 U.S.C. 155, 156, 160). See, e.g., *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

The question in this case is how the RLA's bargaining and status quo obligations apply when a railroad proposes to undertake a sale of assets that, in turn, will lead to a reduction in its labor force requirements. The court of appeals rejected P&LE's argument that the RLA imposes no bargaining obligations at all when—as here—the sale of assets amounts to a decision to go out of business (87-1888 Pet. App.

16a-26a). The court of appeals acknowledged that P&LE is under no obligation to bargain with its unions over its actual decision to sell the assets; the RLA obligates a carrier to bargain, at most, over the *effects* of its decision on rail labor (*id.* at 16a, 24a).<sup>10</sup> Nevertheless, the court of appeals concluded that Section 6's command that a carrier shall not alter "rates of pay, rules, or working conditions" during the bargaining process prevents P&LE from taking actions to complete the sale and reassign or discharge employees, even if such actions are permissible under the existing collective bargaining agreements (*id.* at 17a-18a, 25a-26a).

P&LE relies (87-1888 Pet. 17) on this Court's decision in *Textile Workers Union v. Darlington Mfg.*, 380 U.S. 263 (1965), to support its contention that the RLA imposes no bargaining obligations at all when a railroad elects to go out of business. In *Darlington*, a case decided under the National Labor Relations Act (NLRA), 29 U.S.C. (& Supp. IV) 151 *et seq.*, this Court held that when "an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice" (380 U.S. at 274). P&LE urges that the principle recognized in *Darlington* that the NLRA "does not compel one to become or remain an employer" (*id.* at 271), applied in the present context, should relieve the railroad of its RLA bargaining obligations.

<sup>10</sup> "This dispute in this case is not about the decision to sell the P&LE's rail lines; it is about the effects of that decision on the employees of the railroad" (87-1888 Pet. App. 16a (footnote omitted)). "We agree, and the union apparently concedes, that the railroad has no obligation to bargain over the underlying decision itself, *viz.*, to cease operating as a railroad and to sell its rail assets" (*id.* at 24a (citing *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981))).

We think it clear that *Darlington's* reasoning should extend to the issues presented in this case. Although the mandatory scope of bargaining under the RLA is "not coextensive with the National Labor Relations Act and the Board's jurisdiction over unfair labor practices" (*First Nat'l Maintenance Corp.*, 452 U.S. 666, 686-687 n.23 (1981)), the basic policies underlying *Darlington* should translate with equal or greater force in the railway and airline labor context. Indeed, because the ICC has the statutory authority to approve any abandonment, merger, or transfer of control of a rail line (see note 1, *supra*), and because the ICC has the authority to condition its approval of any such transaction by imposing appropriate labor protection measures (see page 7, *supra*), there is, if anything, *less* reason to require a rail carrier to bargain over a decision to go out of business than there is in the NLRA context.

The courts of appeals apparently have not given careful consideration to or clear guidance on the question whether and how the principles established in *Darlington* apply to cases arising under the RLA. Compare *Air Line Pilots Ass'n v. Transamerica Airlines, Inc.*, 817 F.2d 510, 512 n.1 (9th Cir. 1987) (stating that "effects bargaining may continue despite the cessation of flight operations") with *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549, 558-559 (1st Cir.), cert. denied, 409 U.S. 845 (1972) (stating that "[w]here it is clear, as in the case of a merger, that bargaining about some effects of the decision would be ineffective unless the company could be required to renegotiate the merger, we believe that the duty to bargain about those effects does not arise at all"). The Court

may therefore wish to take this opportunity to resolve this important question.<sup>11</sup>

A matter of equally pressing practical concern is the court of appeals' interpretation of Section 6's status quo requirements. The court of appeals has broadly held that if a rail labor union serves a Section 6 notice that proposes changes in a collective bargaining agreement, Section 6's status quo requirements prohibit the railroad from taking actions adverse to labor even though such actions would be permissible or authorized under the existing employer-employee relationship. That ruling is not required by the RLA's language or objectives, nor is it compelled by this Court's precedents.

As previously discussed, the RLA is concerned with formation and maintenance of "agreements concerning rates of pay, rules, and working conditions" (45 U.S.C. 152 (First)). Section 6 accordingly requires a carrier to bargain with a union concerning any proposed change in agreements affecting those three mandatory subjects of bargaining, and it further pro-

<sup>11</sup> Whatever the answer to that question, P&LE should not be required to bargain over its actual decision to sell its assets, a matter that is quintessentially a question of business judgment. The court of appeals concluded (and the unions apparently agreed) that P&LE is required to bargain only concerning the effects on labor of the proposed transaction. See note 10, *supra*. As this Court has explained in the NLRA context, "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." *First Nat'l Maintenance Corp.*, 452 U.S. at 686. See also *id.* at 678-679 (footnote omitted) ("Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business.").

vides that the carrier must continue to honor its extant obligations with respect to those subjects through the course of the bargaining process (45 U.S.C. 156). But while Section 6 instructs the carrier to preserve the "rates of pay, rules, or working conditions" (45 U.S.C. 156), it does not prevent the carrier from taking actions that are authorized under the existing collective bargaining agreements. Thus, the filing of a Section 6 notice need not prevent a railroad from undertaking management initiatives that will affect its work force, provided that those actions are taken in accordance with the railroad's present obligations to its employees as reflected in the existing "rates of pay, rules, or working conditions."

A substantial argument can be made, therefore, that the court of appeals erred in construing Section 6 as requiring the broad status quo obligation that the court imposed in this case. The court rested its decision in part on the premise that P&LE's proposed sale necessarily "would require a 'change in agreements affecting rates of pay, rules, or working conditions'" (87-1888 Pet. App. 17a) or would "change the nature of those agreements" (*id.* at 18a (emphasis in original)). But collective bargaining agreements frequently recognize, explicitly or implicitly, that an employer may make reductions in his work force or go out of business completely and often provide labor protection—including reassignment opportunities and severance pay—when the employer exercises that right.<sup>12</sup>

<sup>12</sup> A question occasionally may arise whether a collective bargaining agreement does or does not permit labor force reductions in certain circumstances. The resolution of that question, which turns on an interpretation of the agreement, is a "minor dispute" that is subject to mandatory arbitration by the National Railroad Adjustment Board (NRAB) or to its

Alternatively, the court reasoned that the *union* had proposed a change in the collective bargaining agreement, and that this proposal required P&LE to preserve the "objective working conditions out of which the dispute arose," including "the very existence of its workers' jobs" (Pet. App. 17a, 18a). As support for this proposition, the court relied upon *Detroit & T.S.L.R.R. v. United Transp. Union*, 396 U.S. 142 (1969). That decision, however, need not be read so broadly. *Detroit* may simply stand for the proposition that rates of pay, rules, or working conditions "need not be covered in an existing agreement" if, for example, they have "occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions." *Id.* at 153-154.<sup>13</sup> In any event, neither *Detroit* nor *Order of*

statutory alternatives. See 45 U.S.C. 153 ((First), (Second)). The court of appeals did not address that question here (87-1888 Pet. App. 16a-17a n.9). It is well settled (and not a matter of dispute in this case) that "if the subject matter of the parties' dispute is 'arguably comprehended' within, and potentially amenable to resolution by reference to, their existing collective bargaining agreements and the attendant established past practices" the matter falls within the exclusive jurisdiction of the NRAB. *E.g.*, *Chicago & N.W. Transp. Co. v. Railway Labor Executives' Ass'n*, 855 F.2d 1277, 1284 (7th Cir. 1988), petition for cert. pending, No. 88-464 (filed Sept. 16, 1988).

<sup>13</sup> This result naturally follows from the recognition that an employer-employee relationship frequently rests on implied understandings. "It would be virtually impossible to include all working conditions in a collective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested [by the RLEA] that this practice is more frequent in the railroad industry than in most others" (396 U.S. at 154-

*R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960), on which the court also relied, involved a decision to go entirely out of business through a sale of assets or otherwise.

In sum, the court's construction of Section 6 would allow the railroad's employees to nullify their collective bargaining agreements unilaterally and freeze the entire employer-employee relationship through the simple expedient of serving a Section 6 notice. That ruling may have far-reaching consequences for labor-management relations in the railroad and airline industry and warrants this Court's review.<sup>14</sup>

3. P&LE further contends, in No. 87-1589, that Section 4 of the Norris-LaGuardia Act, which provides *inter alia* that the courts shall have no jurisdiction to enjoin a labor strike (29 U.S.C. 104), does not deprive a federal district court of jurisdiction to enjoin a labor strike designed to block an ICC-approved rail transaction. The court of appeals rejected that contention, reasoning that Section 4, by its terms, would apply in this case and that the relevant ICA provisions give no indication that Congress intended that the ICA would override Section 4's anti-injunction policy (87-1589 Pet. App. A1-A13).

This question has practical importance since it typically is the first—and often the most pressing—

155 (footnote omitted)). See also *id.* at 159-161 (Harlan, J., concurring in part and dissenting in part).

<sup>14</sup> F&LE also contends that the imposition of a status quo injunction in these circumstances amounts to a taking of property without just compensation in violation of the Fifth Amendment. See 87-1888 Pet. 26-27. The court of appeals did not address that argument, which P&LE raised for the first time in that court. The United States submits that this novel question would not independently warrant this Court's review.

issue for the courts to decide in labor-management disputes arising out of rail line sales. This Court in other contexts has accommodated Section 4's prohibition against federal court injunctions of labor strikes with the terms and objectives of other statutes that address labor relations. See *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 250-252 (1970) (Labor Management Relations Act); *Brotherhood of R.R. Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30, 41 (1957) (RLA). The question is whether there is a need for similar accommodation here. The answer depends, at least in part, on the answer to the first question presented: whether the ICC's approval of a rail transaction relieves the carrier of its RLA bargaining obligations. Obviously, it would make little sense to imply an exception to Section 4's prohibition in the case of an ICC-approved transaction if the railroad must bargain irrespective of the ICC's approval. We also note that the Eighth Circuit, which has concluded that the ICC's approval of a short-line transaction relieves the railroad of any RLA bargaining obligations (*Chicago & N.W. Transp. Co. v. Railway Labor Executives' Ass'n*, *supra*), has nonetheless held that ICC approval does not relieve the courts of Section 4's prohibition of labor strike injunctions. *Burlington N.R.R. v. United Transp. Union*, 848 F.2d 856 (1988).<sup>15</sup>

There presently is no conflict among the circuits on this question. Nevertheless, we would submit that

<sup>15</sup> The court reasoned that there is "no inherent incompatibility between the recent deregulatory efforts of the Congress and the ICC and the continued viability of Norris-LaGuardia in the circumstances presented here" (848 F.2d at 864), stating that "implicit in the congressional vision of a vigorous free market is the realization that all major participants in

the matter is of a sufficient importance and close relationship to the questions presented in No. 87-1888 to warrant this Court's review.<sup>16</sup>

### CONCLUSION

The petitions for writs of certiorari in No. 87-1589 and No. 87-1888 should be granted.

Respectfully submitted.

CHARLES FRIED

*Solicitor General*

THOMAS W. MERRILL

*Deputy Solicitor General*

JEFFREY P. MINEAR

*Assistant to the Solicitor General*

NOVEMBER 1988

the economy must be left free to exercise their economic strength" (*ibid.*).

<sup>16</sup> The ICC recently filed a petition for writ of certiorari in the *Burlington* case. See *ICC v. United Transp. Union*, No. 88-711 (filed Oct. 28, 1988). There, as in this case, the ICC lacked statutory authority to participate in the lower court proceedings and lacks authority to petition this Court for review. See note 5, *supra*.

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Nos. 87-1589 and 87-1888

Supreme Court, U.S.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

PITTSBURGH & LAKE ERIE RAILROAD COMPANY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION

ON WRITS OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED

*Solicitor General*

THOMAS W. MERRILL

*Deputy Solicitor General*

JEFFREY P. MINEAR

*Assistant to the Solicitor General*

*Department of Justice*

*Washington, D.C. 20530*

*(202) 633-2217*

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## QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission's authorization of a rail line acquisition by a non-carrier: (a) relieves the selling railroad of any obligation to bargain with its employees in accordance with the Railway Labor Act concerning the sale; and (b) relieves the courts of the provisions of the Norris-LaGuardia Act prohibiting injunctions in cases involving labor disputes.

2. Whether the Railway Labor Act requires a railroad to postpone a sale of its rail lines to a non-carrier until the railroad has completed bargaining with its unions concerning the unions' proposed changes in the existing collective bargaining agreements that would address the effects of that sale.

3. Whether a court order requiring a railroad to continue its operations while it is bargaining under the Railway Labor Act violates the Fifth Amendment's prohibition against the taking of property without just compensation.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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Nos. 87-1589 and 87-1888

PITTSBURGH & LAKE ERIE RAILROAD COMPANY, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION

---

*ON WRITS OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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**INTEREST OF THE UNITED STATES**

This case concerns the application of the Interstate Commerce Act (ICA), 49 U.S.C. 10101 *et seq.*, the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, and the Norris-LaGuardia Act (NLGA), 29 U.S.C. 101 *et seq.*, to a railroad's dispute with its labor unions over the railroad's proposed sale of its rail assets. The United States has an interest in such disputes as a result of the regulatory and mediational responsibilities of its various agencies, including the Interstate Commerce Commission, the Federal Railroad Administration, and the National Mediation Board.<sup>1</sup>

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<sup>1</sup> The Solicitor General filed a brief amicus curiae in this case at the petition stage in response to the Court's order inviting him to express the views of the United States. The Solicitor General has not authorized any federal agency to file a brief in this case on its own behalf.

## STATEMENT

The Pittsburgh & Lake Erie Railroad Company (P&LE) filed separate petitions for writs of certiorari to review two related court of appeals decisions arising from P&LE's dispute with its labor unions over the railroad's proposed sale of its rail assets. The first petition, No. 87-1589, requested review of a court of appeals' decision holding that Section 4 of the NLGA, 29 U.S.C. 104, prohibits the courts from enjoining a labor strike arising from the railroad's sale of its rail lines to another company in a transaction authorized by the Interstate Commerce Commission (ICC) pursuant to the ICA. The second petition, No. 87-1888, requested review of a subsequent decision by the same court of appeals holding that P&LE must first bargain with its unions over the effects of the railroad's proposed sale of its rail lines pursuant to the provisions of the RLA, 45 U.S.C. 151 *et seq.*, before completing the sale. This Court granted the petitions and consolidated them in the instant proceeding.

### A. The Relevant Statutes

1. The ICA establishes a national transportation policy to promote efficient, competitive carriage of goods and persons (49 U.S.C. 10101, 10101a) and creates the ICC to implement that policy (49 U.S.C. 10301 *et seq.*). The ICA grants the ICC broad jurisdiction over various forms of transportation, including rail carriage (49 U.S.C. 10501), and gives the ICC power to exempt carriers from ICA regulation (49 U.S.C. 10505). The ICA specifically regulates, *inter alia*, the construction and operation (49 U.S.C. 10901) or abandonment (49 U.S.C. 10903) of rail lines and the combination (including consolidation, merger and acquisition of control) of rail carriers (49 U.S.C. 11341 *et seq.*).

The ICA, in its present form, reflects a number of amendments enacted in 1980 to revitalize the railroad industry by reducing or eliminating regulatory burdens. See Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. The ICC has responded to these amendments and the newly revised national

rail transportation policy (49 U.S.C. 10101a) in various ways.<sup>2</sup> Of particular relevance here, the ICC has encouraged the nation's railroads to sell, rather than to abandon, less profitable regional rail lines. The ICC has recognized that sale of these rail lines in lieu of abandonment frequently provides business opportunities for new, smaller, and more efficient carriers while preserving local rail service and related employment opportunities. The ICC has assisted the trend toward sale rather than abandonment of rail lines by supplementing the Section 10901 procedures governing approval of rail line acquisitions with a streamlined process—the *Ex Parte* No. 392 class exemption—for prompt regulatory authorization of those transactions. See *Ex Parte* No. 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), review denied mem. *sub. nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).<sup>3</sup>

The ICC has the power to condition its approval of Section 10901 acquisitions on the provision of measures to protect affected rail employees (49 U.S.C. 10901(c)(1)(A)(ii), (e)). See *ICC v. Railway Labor Executives' Ass'n*, 315 U.S. 373 (1942); *United States v. Lowden*, 308 U.S. 225 (1939); see also 49 U.S.C. 10101a(12). Since the passage of the Staggers Act, the ICC generally has declined to provide such protection on the

<sup>2</sup> For the convenience of the Court, we have reprinted the 15-point national rail transportation policy as an addendum to this brief. See Add., *infra*, 1a-2a.

<sup>3</sup> The ICA generally provides that a party may acquire a rail line only if the party first obtains ICC approval. See 49 U.S.C. 10901. However, the ICC is empowered to exempt a person, class of persons, or transaction from the Section 10901 approval process if it finds that ICC oversight is "not necessary to carry out" the national rail transportation policy and the transaction or service is of "limited scope" or the application of the relevant statutory provisions is "not needed to protect shippers from the abuse of market power" (49 U.S.C. 10505(a)). After the passage of the Staggers Act, the ICC regularly (and generally without opposition) exempted individual acquiring entities from the Section 10901 approval process. In 1985, the ICC codified existing practice by establishing a blanket exemption for Section 10901 acquisitions by "non-carriers" (i.e., new entrants into the railroad business), the so-called *Ex Parte* No. 392 exemption. See 1 I.C.C.2d 810-811.

ground that it would effectively foreclose the formation of new rail carriers and would ultimately lead to further loss of jobs through the abandonment and dismantling of marginal rail lines. See 87-1888 Pet. App. 110a-111a. In issuing *Ex Parte No. 392*, the ICC indicated that rail labor could file a petition under 49 U.S.C. 10505(d) to revoke a particular line acquisition's exemption from the Section 10901 approval process if it demonstrated that "exceptional" circumstances justified labor protection in the transaction. 1 I.C.C.2d at 815.

2. The RLA is designed to avoid and resolve disputes between rail or airline management and labor that may lead to "impairment or interruption of interstate commerce \* \* \*." H.R. Rep. No. 328, 69th Cong., 1st Sess. 1 (1926). In order "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein" (45 U.S.C. 151a), the Act imposes a duty on "all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise" (45 U.S.C. 152 First). The Act further provides distinct procedures for resolving so-called "major" and "minor" disputes.

Major disputes involve "the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy." *Elgin, J. & E.R.R. v. Burley*, 325 U.S. 711, 723 (1945), *aff'd on reh'g*, 327 U.S. 661 (1946). Because major disputes "present the large issues about which strikes ordinarily arise" and "because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the processes of noncompulsory adjustment" (325 U.S. at 723-724). Where such a dispute is involved, the parties must preserve "rates of pay, rules, [and] working conditions" (45 U.S.C. 156) while they engage in a lengthy process of negotiation, mediation, and possibly review by a Presidential Emergency Board. See *Detroit & T.S.L.R.R. v. United Transp. Union*, 396 U.S. 142 (1969). If that process fails to pro-

duce an agreement, however, each side is free to resort to strikes (including secondary picketing), lock-outs, or other forms of economic self-help calculated to achieve the desired objectives. See 45 U.S.C. 152 Second and Seventh, 155 First, 156, 157, 160; *Burlington N.R.R. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 444, n.10 (1987); *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

By contrast, minor disputes involve "the meaning or proper application" of a particular collective bargaining agreement, or they may relate to the so-called "omitted case," in which a dispute "is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement" (*Elgin*, 325 U.S. at 723).<sup>4</sup> "Minor disputes initially must be dealt with through a railroad's internal dispute resolution processes." *Atchison T. & S.F.R.R. v. Buell*, 480 U.S. 557, 563 (1987). Unlike a major dispute, if a minor dispute is not settled through initial discussions, it may be "referred by petition of the parties or by either party" to one of a number of grievance "adjustment boards" including the National Railroad Adjustment Board (NRAB). 45 U.S.C. 153 First (i), Second. In such circumstances, the adjustment board's arbitration is compulsory (45 U.S.C. 153 First (i), Second), its decision is binding on the parties (45 U.S.C. 153 First (m), Second), and judicial review is narrowly limited to whether the board exceeded its jurisdiction, failed to comply with the RLA's specific statutory requirements, or was influenced by fraud or corruption (45 U.S.C. 153 First (q), Second). See *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 93 (1978) (*per curiam*).

3. The NLGA "expresses a basic policy against the injunction of activities of labor unions." *Burlington N.R.R.*, 481 U.S. at 437 (quoting *Machinists v. Street*, 367 U.S. 740, 772 (1961)). Section 1 states that "[n]o court of the United States

<sup>4</sup> As the Fifth Circuit has explained, the question "whether a dispute is major or minor has absolutely nothing to do with how important a dispute is. The sole question is whether the proposed change has a basis in the contract." *International Brotherhood of Teamsters v. Southwest Airlines Co.*, 842 F.2d 794, 803 (5th Cir. 1988).

\* \* \* shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter." 29 U.S.C. 101. Section 4(a) lists specific acts that shall not be subject to injunction, including: "Ceasing or refusing to perform any work or to remain in any relation of employment" (29 U.S.C. 104(a)).

The NLGA was enacted in response to federal court decisions that, in Congress's view, gave an overly narrow interpretation to Section 20 of the Clayton Act, 29 U.S.C. 52, which prohibits injunction of various labor activities. See *Burlington N.R.R.*, 481 U.S. at 437-439; *United States v. Hutcheson*, 312 U.S. 219, 235-236 (1941). This Court has interpreted the NLGA in light of its historical purpose while accommodating the NLGA's broad prohibition against federal court injunctions of labor strikes with the terms and objectives of other statutes that address labor relations. See *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 250-252 (1970) (Labor Management Relations Act); *Brotherhood of R.R. Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30, 41 (1957) (RLA).

#### B. The Present Dispute

1. P&LE is a small railroad that owns and operates 182 miles of rail line in western Pennsylvania and eastern Ohio. P&LE has experienced financial difficulties and, on July 8, 1987, it entered into an agreement to sell its rail lines to P&LE Railco, Inc. (Railco), a newly formed company that intended to operate those lines with a reduced contingent of employees. Railco's acquisition of P&LE's rail lines was subject to the ICC's approval in accordance with the ICA. See 87-1589 Pet. App. A2-A3; 87-1888 Pet. App. 11a-13a.

When informed of the proposed sale, P&LE's unions requested the railroad to serve notices under Section 6 of the RLA, 45 U.S.C. 156, and to commence collective bargaining with the unions over the effects on labor of its decision to discontinue its railroad business. P&LE responded that it had no duty to bargain under the circumstances. The unions then

served Section 6 notices proposing changes to their collective bargaining agreements to give the employees greater protection in the event of a sale. See 45 U.S.C. 156. The Railway Labor Executives' Association (RLEA), on behalf of P&LE's unions, thereafter brought an action in the United States District Court for the Western District of Pennsylvania to enjoin the sale and to force P&LE to bargain. On September 15, 1987, the unions commenced a general strike of the P&LE. See 87-1589 Pet. App. A3-A4; 87-1888 Pet. App. 11a-14a.

On September 19, 1987, Railco filed a "notice of exemption" with the ICC seeking exemption from the ICA approval process under the ICC's *Ex Parte No. 392* "non-carrier" exemption regulations. See pages 3-4, *supra*. Under *Ex Parte No. 392*, an exemption becomes effective and the transaction may be carried out seven days after the filing of a notice by the acquiring entity unless a petition to revoke the exemption has been filed and granted or the transaction is stayed by the ICC. See 49 C.F.R. Pt. 1150.<sup>5</sup> On September 25, 1987, the ICC denied RLEA's request for a stay, and on October 2, 1987, RLEA filed a petition to revoke Railco's exemption, which remains pending before the agency. See 87-1589 Pet. App. A4; 87-1888 Pet. App. 10a-14a.

Meanwhile, P&LE requested the district court to enjoin the RLEA general strike on the ground that the work stoppage was an illegal attempt to interfere with the ICC's exclusive jurisdiction over Railco's purchase of the rail line. The court ultimately agreed and issued an injunction. See 87-1589 Pet. App. B1-B10. RLEA appealed, and the court of appeals summarily reversed the district court's decision. See *id.* at A1-A13 (*P&LE J.*). The court held that Section 4 of the NLGA, 29 U.S.C. 104, deprived the district court of jurisdiction to issue the injunction, rejecting P&LE's contention that the NLGA must be accommodated to the ICA, and remanded the case for a determination whether P&LE was obligated to comply with the RLA bargain-

<sup>5</sup> On February 29, 1988, the ICC modified the *Ex Parte No. 392* exemption procedures to extend the notice periods and delay the effective date of the exemptions involving line sale transactions that result in the creation of larger railroads. 53 Fed. Reg. 5,981.

ing procedures. P&LE then petitioned this Court, in No. 87-1589, for a writ of certiorari to review that decision.

2. On remand, the district court held that P&LE was obligated to bargain under the RLA concerning the effects of the proposed sale on its employees and enjoined the sale "to the extent that such sale does not include provisions for the maintenance of the status quo" (87-1888 Pet. App. 71a-85a). P&LE appealed, and the court of appeals affirmed the district court's decision. See *id.* at 1a-70a (*P&LE II*). The court of appeals concluded that the RLA required P&LE to bargain with its unions over the effects on labor of the railroad's proposed sale of assets and that the RLA's "status quo" provisions prohibited P&LE from completing the sale and eliminating any workers' employment during the bargaining process (*id.* at 16a-26a). The court rejected the contention that the ICC's exemption of P&LE's proposed sale from the requirements of the ICA relieved the railroad of its bargaining obligations (*id.* at 26a-57a). Judge Hutchinson dissented, concluding that "the RLA and the ICA are inherently contradictory in this respect and that Congress intended the ICA to prevail" (*id.* at 61a). P&LE petitioned this Court, in No. 87-1888, for a writ of certiorari to review the court of appeals' decision.<sup>6</sup>

### SUMMARY OF ARGUMENT

The court of appeals correctly concluded that the ICA does not implicitly repeal the RLA collective bargaining provisions that otherwise would be applicable to this transaction. The ICA empowers the ICC to approve an acquiring entity's proposed

<sup>6</sup> The court of appeals recently entered yet another decision arising from the RLEA's objections to P&LE's proposed sale of its rail assets. See *Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R.*, 858 F.2d 936 (3d Cir. 1988) (*P&LE III*). RLEA had brought a state court action seeking to enjoin P&LE's sale on the ground that it violated the Pennsylvania Fraudulent Conveyance Act, Pa. Stat. Ann. tit. 39, §§ 351-363 (Purdon 1954), and P&LE removed the action to federal court. The court of appeals held that removal was improper and instructed the district court to remand the case to the state court.

acquisition of a rail line, and it empowers the ICC, in its discretion, to impose labor protective conditions as a part of its approval. 49 U.S.C. 10901. The RLA, by contrast, governs the resolution of labor disputes arising from the formation, change, or interpretation of collective bargaining agreements. While there is some tension between the ICA and the RLA, the relevant provisions can stand together. They do not exhibit the sort of irreconcilable conflict that normally must be present to support an implicit repeal. It follows that if the ICA does not implicitly relieve the selling railroad of its RLA obligations in this situation, it cannot nullify the NLGA's anti-injunction provisions and allow a court to enjoin a labor strike brought in response to the railroad's failure to comply with the RLA.

The court of appeals was also correct in holding that the RLA imposes a duty on the railroad to bargain over the effects of its decision to go out of the railroad business. This duty, however, must be read in light of the railroad's right to exercise its basic managerial prerogatives. While the railroad is obligated to confer on employee proposals concerning the effects of the business closure, it is under no obligation to bargain over proposals that would prevent it from effectuating its decision to close. Likewise, the railroad's duty to bargain over effects generally should end once the railroad has fulfilled its existing contractual obligations and has discontinued its operations.

While the court of appeals was correct in concluding that the RLA requires a railroad to engage in effects bargaining, the court erred in interpreting the RLA's status quo obligations. The railroad is not obligated to preserve jobs during the bargaining process, it is obligated to preserve "rates of pay, rules, [and] working conditions" (45 U.S.C. 156). The railroad is therefore entitled to take actions during the bargaining process that affect its employees, provided that those actions are authorized either under the existing collective bargaining agreement or through the implicit understanding of the parties as reflected in established work practices. This result is not only consistent with the RLA's language, it furthers the RLA's objective of encouraging the formation of agreements that specify in

advance the rights of management and labor in the face of future contingencies. Such agreements would be pointless if, once the contingency occurred, either party could suspend the agreement by simply proposing to amend the accord.

P&LE's claim that the court of appeals' status quo requirements amount to an "erosive" taking (which apparently was first raised in the court of appeals) is not supported by a factual record and, accordingly, cannot be resolved in this proceeding. In any event, our construction of the RLA status quo obligation eliminates any prospect of a Fifth Amendment violation. The railroad can suffer no erosive taking if its obligation to remain in business results from consensual commitments set forth in its collective bargaining agreements or arises from its implicit understandings with its employees.

#### ARGUMENT

##### I. The ICC'S Authorization Of A New Carrier's Acquisition Of P&LE'S Rail Assets Did Not Exempt P&LE From The Provisions Of The Railway Labor Act And The Norris-LaGuardia Act

P&LE urges that the ICC's authorization of a non-carrier's acquisition of existing rail lines relieves the selling railroad of any RLA obligation to bargain with its employees concerning the sale and relieves the courts of the provisions of the NLGA prohibiting injunctions in cases involving labor disputes. P&LE's arguments are not without force, but they ultimately are unpersuasive.

Congress's scheme for regulating rail line acquisitions does create some tension between the ICA and the RLA. Congress has given the ICC broad authority, through Section 10901 of the ICA, to approve or disapprove rail line acquisitions and to impose conditions on the transactions designed to ameliorate the transaction's impact on rail labor. 49 U.S.C. 10901. But Congress has also provided a general framework, through the RLA's "major" dispute provisions, for making changes to existing collective bargaining agreements. Congress has given no express guidance on how the ICC's exercise (or withholding) of its dis-

cretionary power to impose labor protection affects the otherwise applicable RLA mechanisms for resolving labor-management disputes. Faced with this silence, P&LE essentially argues that the ICA repeals by implication any otherwise applicable provisions of the RLA that would block implementation of the ICC-approved transaction. See 87-1589 Pet. 15-16, 22; 87-1888 Pet. 16.

This Court has repeatedly recognized that repeals by implication are not favored. *E.g.*, *United States v. Fausto*, No. 86-595 (Jan. 25, 1988), slip op. 13; *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Morton v. Mancari*, 417 U.S. 535, 549 (1974). One federal law should not be held to repeal another unless there is an "intolerable conflict between the two statutes." *Atchison T. & S.F. R.R.*, 480 U.S. at 566-567.<sup>7</sup> In our view, the present case does not meet that threshold.

The pertinent ICA section involved here—Section 10901—does not provide any affirmative textual basis for superceding otherwise applicable labor law. Section 10901(a) states that a rail carrier providing transportation subject to the jurisdiction of the ICC may construct or acquire a rail line "only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line." 49 U.S.C. 10901(a). The ICC evaluates the public convenience and necessity in light of the 15 policy concerns identified in the ICA's national rail transportation policy, 49 U.S.C. 10101a. See *Add.*, *infra*, 1a-2a. It approves a proposed acquisition through the issuance of a certificate of public convenience and necessity, which may "require compliance with conditions the Commission finds necessary in the public interest" (49 U.S.C. 10901(c)).

<sup>7</sup> The conflict generally must be "irreconcilable." See, *e.g.*, *Watt*, 451 U.S. at 266; *Morton*, 417 U.S. at 550; *FTC v. A.P. W. Paper Co.*, 328 U.S. 193, 202 (1946); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). As the Court has explained, "We must read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Watt*, 451 U.S. at 267. Accord, *Morton*, 417 U.S. at 551; *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939); *Wood v. United States*, 41 U.S. (16 Pet.) 342, 362-363 (1842).

The ICC may condition its approval of a proposed Section 10901 acquisition on the acquiring entity's satisfaction of reasonable public interest requirements, including labor protection conditions, derived from the national rail transportation policy. See *ICC v. Railway Labor Executives' Ass'n*, 315 U.S. 373 (1942); *United States v. Lowden*, 308 U.S. 225 (1939); see also 49 U.S.C. 10101a(12). But this does not mean that the ICC can exercise its permissive authority to remove other potential legal obstacles to the transaction. Congress has authorized the ICC to approve or disapprove Section 10901 acquisitions on the basis of specific statutory criteria set forth in Section 10101a; it has not given the agency any express powers to compel the consummation of those privately negotiated transactions or to insulate a contracting party—in this case the selling railroad—from legal or economic hindrances, such as the RLA, that may render an acquisition impractical or less desirable. Cf. *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298 (1954).<sup>8</sup>

<sup>8</sup> Section 10901(d) does allow a carrier to construct a rail line across the property of another carrier subject to the conditions of reasonable use and compensation. 49 U.S.C. 10901(d). Furthermore, Section 10901(e) provides that the ICC "may require any rail carrier proposing both to construct and operate a new railroad line pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby \* \* \*." 49 U.S.C. 10901(e). But these provisions, which deal with the construction of new rail lines, obviously have no application to the present situation, which involves the acquisition of an existing rail line. Indeed, the former provision indicates, if anything, that when Congress wishes to relieve a railroad of an obstacle to consummation of a transaction, it does so expressly. And the latter provision, which gives the ICC discretion to impose labor-protective conditions, does not expressly displace a railroad employee's preexisting collective bargaining rights.

We note that when Congress passed the Staggers Act, it provided for additional mandatory or discretionary labor protection with respect to various transactions. However, Congress declined to impose mandatory labor protection in the case of Section 10901 transactions. See H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 115-116 (1980). We do not believe that Congress's action there, or in other instances involving the extension of labor protection, provides any concrete guidance, one way or the other, concerning Section 10901's preemptive effect. The history of congressionally-imposed rail labor protection prior to the passage of the Staggers Act is summarized in H.R. Rep. No. 1035, 96th Cong., 2d Sess. 139-145 (1980).

Giving effect to both the ICA and the RLA is not only consistent with the specific ICA provision applicable in this case, it also is consistent with the general purposes and structure of the two acts.<sup>9</sup> We think it particularly relevant that when Congress has wished to remove legal obstacles to the consummation of various ICA transactions, it has done so expressly.<sup>10</sup> Given that practice, it is difficult to surmise that Congress would have curtailed the RLA's fundamental role in the resolution of labor-management disputes through the backhanded manner of implicit repeal.<sup>11</sup>

<sup>9</sup> A fair reading of ICA's terms indicates that the Section 10901 approval process and the RLA collective bargaining provisions stand as two largely separate statutory regimes that are each applicable to a proposed acquisition and that are each directed to largely separate concerns. The Section 10901 approval process assures that the acquiring party will satisfy the general public interest requirements of convenience and necessity in accordance with the national rail transportation policy. See 49 U.S.C. 10101a. The RLA collective bargaining provisions are directed, by contrast, to the more specific problem of resolving specific "disputes concerning rates of pay, rules, or working conditions" and "disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. 151a. Thus, each statute plays a distinct role in—and imposes separate legal constraints on—the consummation of a proposed transaction.

<sup>10</sup> See note 8, *supra*. Elsewhere in the ICA, Congress has expressly provided that the ICC may compel a "forced sale" of lines otherwise subject to abandonment. 49 U.S.C. 10905. And Congress has expressly provided that a participant in an ICC-authorized rail merger "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction" (49 U.S.C. 11341). See *ICC v. Brotherhood of Locomotive Engineers*, No. 85-792 (June 8, 1987), slip op. 9-17 (Stevens, J., concurring in the judgment). Thus, when Congress has intended for the ICA to repeal other federal laws or existing legal rights, it has generally provided expressly for that result. But see *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318-319 (1981) (holding that the ICA preempts by implication state attempts to regulate commerce).

<sup>11</sup> Implicit repeal is particularly difficult to find in this case, where the acquiring entity received ICC authorization to go forward with the purchase through an ICC class exemption granted pursuant to Section 10505 of the ICA. See pages 3-4, 7 *supra*. Section 10505(a) provides that the ICC "shall exempt a person, class of persons, or a transaction or service when the Com-

In sum, there is no satisfactory textual or contextual basis for concluding that the ICC's exercise of its Section 10901 authority must result in the implicit repeal of the RLA.<sup>12</sup> The Section 10901 approval process is simply *one* of the hurdles that must be cleared in the course of completing a rail line acquisition. The ICC's authorization gives an acquiring entity assurance that the transaction is consistent with the ICA, but it does not relieve the selling railroad of its RLA bargaining obligations. And it naturally follows that if Section 10901 does not implicitly relieve the selling railroad of its RLA obligations, it cannot nullify the NLGA's anti-injunction provisions and allow a court to enjoin a labor strike brought in response to the railroad's failure to comply with the RLA. See U.S. Pet. Amicus Br. 17-18.<sup>13</sup>

mission finds that the application of a provision of this subtitle (1) is not necessary to carry out the transportation policy of section 10101a of this title; and (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power." 49 U.S.C. 10505(a). The ICC's grant of the class exemption accordingly represents its determination that application of the relevant ICA provisions in that class of cases is not necessary to carry out the national rail transportation policy. If the ICA provisions are not applicable, it is difficult to see how there would be an "irreconcilable conflict" between the ICA and the RLA.

<sup>12</sup> This is not a case, such as *Fausto*, *supra*, where a fair reading of a statute results in the "repeal by implication of a legal disposition implied by a [different] statutory text" (*id.* at slip op. 13 (emphasis added)). The position that P&LE advocates would result in Section 10901 precluding the application of the RLA's express terms, *in toto*, in the case of the pertinent transaction. As this Court explained, "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change" (*ibid.*).

<sup>13</sup> The ICC believes that its authorization of the acquisition here relieves the selling railroad of any otherwise applicable RLA collective bargaining obligations. See U.S. Pet. Amicus Br. 8 & n.7. We have concluded that the ICC's view (as well as its intervention below (see *id.* at 6 n.5)) is based on an incorrect interpretation of its statutory authority. Cf. *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361 (1986).

## II. The Railway Labor Act Does Not Automatically Require P&LE to Postpone The Sale Of Its Rail Lines Until It Has Completed Bargaining With Its Unions Concerning The Union's Proposed Changes In Existing Collective Agreements

P&LE also challenges the court of appeals' determination that the RLA requires the railroad to bargain with its unions over the effects of its proposed transaction and that the RLA's status quo provisions prohibit consummation of the transaction during the bargaining process. Those questions, which are not dispositively answered by this Court's past decisions, involve matters of fundamental importance to labor-management relations in the railroad and airline industry.

The RLA establishes an elaborate mechanism designed to encourage the peaceful resolution of labor disputes likely to disrupt interstate commerce. Section 2 First imposes a basic duty on carriers and their employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise" in order to avoid interruption to commerce or to carrier operations. 45 U.S.C. 152 First. In the case of "major" disputes (see page 4, *supra*), Section 2 Seventh further provides that no carrier "shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in [Section 6 of the RLA]." 45 U.S.C. 152 Seventh.

Section 6 of the RLA provides that carriers and employee representatives must "give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions" and must promptly agree to the time and place for the beginning of conferences to bargain over the proposed changes. 45 U.S.C. 156. The parties may invoke the services of the National Mediation Board to assist in resolving their differences. 45 U.S.C. 155. Once "such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its serv-

ices, rates of pay, rules, or working conditions shall not be altered by the carrier" (45 U.S.C. 156) until the negotiation, mediation, and cooling-off periods (including that associated with a Presidential Emergency Board, if one has been established) have expired. 45 U.S.C. 155, 156, 160. See, e.g., *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

The question in this case is how the RLA's bargaining and status quo obligations apply when a railroad proposes to undertake a sale of assets that, in turn, will lead to a reduction in its labor force. The court of appeals rejected P&LE's argument that the RLA imposes no bargaining obligations at all when—as here—the sale of assets amounts to a decision to go out of business (87-1888 Pet. App. 16a-26a). The court of appeals acknowledged that P&LE is under no obligation to bargain with its unions over its actual decision to sell the assets; the RLA obligates a carrier to bargain, at most, over the *effects* of its decision on rail labor (*id.* at 16a, 24a).<sup>14</sup> Nevertheless, the court of appeals concluded that Section 6's command that a carrier shall not alter "rates of pay, rules, or working conditions" during the bargaining process prevents P&LE from taking actions to complete the sale and reassign or discharge employees, even if such actions are permissible under the existing collective bargaining agreements (*id.* at 17a-18a, 25a-26a).

In support of its contention that it is not obligated to bargain with its employees concerning either its decision to exit from the railroad business or the effect of that decision on its employees, P&LE relies (87-1888 Pet. 17) on this Court's decision in *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). In *Darlington*, a case decided under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, this Court held that when "an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice" (380 U.S. at 274). P&LE urges that the

<sup>14</sup> "The dispute in this case is not about the decision to sell the P&LE's rail lines; it is about the effects of that decision on the employees of the railroad" (87-1888 Pet. App. 16 (footnote omitted)).

principle recognized in *Darlington*, that the NLRA " 'does not compel one to become or remain an employer' " (*id.* at 271), applies in the present context, and should relieve the railroad of its RLA bargaining obligations.

We think it clear that the basic policies underlying *Darlington* should translate with equal force in the railway and airline labor context.<sup>15</sup> The RLA, like the NLRA, should not be read to compel one to become or remain an employer or an employee. See *Darlington*, 380 U.S. at 268, 271. Both persons should be entitled to " 'withdraw from that status with immunity, so long as the obligations of any employment contract have been met.' " *Id.* at 271 (quoting *Darlington Mfg. Co. v. NLRB*, 325 F.2d 682, 685 (4th Cir. 1963)). The RLA, like the NLRA, nowhere manifests, or even suggests, the "startling innovation" (380 U.S. at 270) that an employer cannot terminate his business.<sup>16</sup>

It follows, again by analogy to the NLRA, that P&LE is not obligated to bargain over its actual decision to go out of business. As this Court has explained in *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), another NLRA case, "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business." *Id.* at 678-679. As the Court concluded in that case, "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business

<sup>15</sup> We note, of course, that the NLRA "cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, and with due regard for the many differences between the statutory schemes." *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969).

<sup>16</sup> In this instance, the P&LE is not liquidating completely, but it is apparently ceasing to be a rail carrier within the meaning of the RLA. See 45 U.S.C. 151 First. Once P&LE has properly terminated that status (and fulfilled its existing contractual obligations to its employees), it is no longer subject to the RLA. A successor employer may be subject to various RLA obligations including, under certain circumstances, an obligation to bargain with the union representing its predecessor's employees. See *Fall River Dyeing & Finishing Co. v. NLRB*, No. 85-1208 (June 1, 1987) (NLRA decision). But this case involves P&LE's, rather than its successor's, obligations.

purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." *Id.* at 686. Indeed, even the court of appeals concluded (and the unions apparently agreed) that P&LE is not required to bargain over its actual decision to cease operating as a railroad. See 87-1888 Pet. App. 24a. Accordingly, the scope of bargaining here can extend, at most, to the effects of P&LE's decision to terminate its railroad business.<sup>17</sup>

The court of appeals' conclusion that the RLA imposes a duty on the railroad to bargain about the effects of its decision to go out of the rail business is not in itself unreasonable. Section 6 of the RLA (45 U.S.C. 156), read in light of the RLA's general goal of resolving disputes through the bargaining process (45 U.S.C. 152 First), suggests that the employees may propose changes to their collective bargaining agreement that address the consequences of the railroad's closure.<sup>18</sup> Such proposals give rise to a

<sup>17</sup> Although the scope of mandatory bargaining under the RLA is "not coextensive with the National Labor Relations Act and the Board's jurisdiction over unfair labor practices" (*First Nat'l Maintenance Corp.*, 452 U.S. at 686-687 & n.23), there is no reason to depart from the NLRA's general practice in this instance. Indeed, because the ICC has statutory authority to approve any abandonment, merger, or transfer of control of a rail line (see pages 2-5, *supra*), and because the ICC has the authority to condition its approval of any such transaction by imposing appropriate labor protection measures (*ibid.*), there is, if anything, less reason to require a rail carrier to bargain over a decision to go out of business than there is in the NLRA context. We do not believe this Court's decision in *Railroad Telegraphers v. Chicago & N.W. R.R.*, 362 U.S. 330 (1960), counsels a different result. In *Telegraphers*, the question was not whether the union was entitled to bargain about the railroad's actual decision to close certain facilities; instead, it focused on the union's right to bargain about a proposed amendment to the collective bargaining agreement that would provide job security in the face of the railroad's intention to consolidate its operations. See *id.* at 332 (quoting the proposal); see also *id.* at 336 (citing the "union's effort to negotiate about the job security of its members"). *Telegraphers*, in short, involved effects bargaining.

<sup>18</sup> This Court recognized in *First Nat'l Maintenance Corp.* that the NLRA requires an employer to bargain about the effects of its decision to discontinue a part of its business. 452 U.S. at 677. The NLRB has maintained that the NLRA also imposes a duty to bargain about effects if the employer decides to discontinue its business completely. *Kirkwood Fabricators, Inc. v. NLRB*, No.

"major" dispute insofar as they are proffered for the purpose of changing an existing agreement. See pages 4-5, *supra*. Nevertheless, the railroad's statutory duty to bargain must be read in light of the railroad's right to terminate its business. As this Court recognized in *Darlington*, an employer has a virtually absolute right to go out of business as long as he complies with the obligations set forth in his existing collective bargaining agreement, which sets forth the "rates of pay, rules, and working conditions" (see 45 U.S.C. 152 First) for his employees. His employees are not entitled to use the bargaining process to thwart that right. It follows that while a railroad does have a duty to discuss employee proposals concerning the effects of the business closure—such as termination and job security arrangements, including severance pay and, in appropriate cases, successor employment or reemployment upon reopening—the railroad is under no duty to bargain over proposals that would prevent it from effectuating its decision to close.<sup>19</sup>

By the same token, RLA bargaining concerning the effects of a business closure should not result in the "virtually endless" bargaining and mediation process (*Burlington N.R.R.*, 481 U.S.

87-2110 (8th Cir. Dec. 5, 1988), slip op. 5-6 (upholding the NLRB's "long-standing position that the requirement to bargain over the effects of an employer's decision should extend to the closing and sale of a business under [NLRA] § 8(a)5"). See *Merryweather Optical Co.*, 240 N.L.R.B. 1213 (1979); *Stagg Zipper Corp.*, 222 N.L.R.B. 1249, 1251 (1976); *Interstate Tool Co.*, 177 N.L.R.B. 686, 687 (1969); *New York Mirror, Division of the Hearst Corp.*, 151 N.L.R.B. 834, 838 n.4 (1965). See also *Yorke v. NLRB*, 709 F.2d 1138 (7th Cir. 1983) (upholding the NLRB's requirement that a bankruptcy trustee engage in effects bargaining before liquidating an insolvent business), cert. denied, 465 U.S. 1023 (1984); *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967) (upholding the NLRB's requirement that a company that has decided to terminate and relocate its operations in a joint venture engage in effects bargaining).

<sup>19</sup> Thus, the First Circuit has held, in a case involving a merger of two airlines, that "[w]here it is clear, as in the case of a merger, that bargaining about some effects of the decision would be ineffective unless the company could be required to renegotiate the merger, we believe that the duty to bargain about those effects does not arise at all." *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549, 558-559 (1st Cir.), cert. denied, 409 U.S. 845 (1972).

at 444) that occurs in the case of renewal or revision of a collective bargaining agreement between an ongoing railroad and its employees.<sup>20</sup> The matters at issue when an railroad elects to close are generally discrete, limited, and relatively uncomplicated.<sup>21</sup> Indeed, interminable effects bargaining after a railroad has closed not only would infringe the railroad's right to go out of business, it would not further the basic purpose of the RLA—to avert work stoppages that would interrupt the flow of interstate commerce.<sup>22</sup> Thus, a railroad's duty to bargain over

<sup>20</sup> In *First Nat'l Maintenance Corp.*, the Court stated that "bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time" (452 U.S. at 682). The scope of effects bargaining under the NLRA is determined in light of the scheme of that statute, which requires only that the parties bargain in good faith to impasse before they are free to act unilaterally (*id.* at 687 n.17). The scope of RLA bargaining must be determined in light of the RLA's statutory scheme. See note 15, *supra*. Furthermore, we think that the ICA's provisions for labor protection are highly relevant in this context. Such protection, where available, may diminish the need for effects bargaining.

<sup>21</sup> In assessing an employer's fulfillment of his obligation to bargain in good faith, account must be given to the employer's financial condition and his right to liquidate his business in an expeditious manner. For example, if the employer is insolvent, he may be constrained, both as a matter of his actual financial resources and by statutes prohibiting an insolvent from granting creditor preferences, from honoring requests for additional severance payments.

<sup>22</sup> See *Burlington N.R.R.*, 481 U.S. at 450-452; *Detroit & T.S.L.R.R.*, 396 U.S. at 150; *Brotherhood of Ry. & S.S. Clerks v. Florida East Coast R.R.*, 384 U.S. 238, 246 (1966). This goal, which reflects the public's interest in uninterrupted rail traffic, obviously has little or no relevance once the rail carrier discontinues its operations. Indeed, the bargaining process itself becomes unproductive at that point. Generally speaking, the source of an employer's bargaining power is its ability to pay for work performed, and the source of a union's bargaining power is the value of its members' services. In the case of an ongoing business, an employer may be willing to make concessions concerning job security or severance pay in return for reduced wages. The employer's concessions are, in effect, alternative compensation for work that the employees will perform under the contract. But in the case of a closing business, the employer has no need for continued services and no comparable incentive to make concessions. And the union, which under *Darlington* has no power to thwart the employer's exercise of his right to go out of business, has little or no

effects generally should come to an end once it has fulfilled its existing contractual obligations and has discontinued its operations.<sup>23</sup>

We accordingly submit that the court of appeals did not err to the extent that it required P&LE to engage in the type of limited effects bargaining that we have described. We do submit, however, that the court of appeals erred in interpreting the RLA's status quo obligations. The court of appeals broadly held that if a rail labor union serves a Section 6 notice that proposes changes in a collective bargaining agreement, Section 6's status quo requirements prohibit the railroad from taking actions adverse to labor even though such actions would be permissible or authorized under the existing employer-employee relationship. See 87-1888 Pet. 17a-18a. That ruling is not required by the RLA's language or objectives, nor is it compelled by this Court's precedents.

As previously discussed, the RLA is concerned with formation and maintenance of "agreements concerning rates of pay, rules, and working conditions" (45 U.S.C. 152 First). Section 6 accordingly requires a railroad to bargain with a union concerning any proposed change in agreements affecting those three mandatory subjects of bargaining, and it further provides that the railroad must continue to honor its extant obligations with respect to those subjects during the bargaining process (45 U.S.C. 156). But while Section 6 instructs the railroad to pre-

leverage with which to exact concessions in return. In these circumstances, further effects bargaining quickly becomes an exercise in futility.

<sup>23</sup> Congress recently enacted the Worker Adjustment and Retraining Notification Act, Pub. L. No. 100-379, 102 Stat. 890 (1988), which generally requires employers (including rail carriers) of 100 or more employees to give their employees 60 days' advance notice of partial or complete closures. This statute provides covered employees (who have not made other arrangements in their collective agreements) with an opportunity for limited effects bargaining over announced closures. Of course, employees need not wait until the notice of closing (when they in turn have little bargaining power, see note 22, *supra*) to offer proposals concerning job security. Indeed, collective bargaining agreements frequently address such questions. See *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 336 (1960).

serve the "rates of pay, rules, or working conditions" (45 U.S.C. 156), it does not prevent the railroad from taking actions affecting its employees that are *authorized* either under the existing collective bargaining agreement or through the implicit understanding of the parties as reflected in established work practices.<sup>24</sup>

This result is not only consistent with Section 6's language, it is consistent with the RLA's fundamental objective of utilizing collective bargaining to settle disputes and to avoid interruptions of interstate commerce. See 45 U.S.C. 151a, 152. The stability of rail commerce is best served by agreements that specify in advance the rights of management and labor in the face of future contingencies. Congress certainly intended that the RLA would encourage, rather than impede, the formation of such accords. But the creation of those agreements would be pointless and the goal of commercial stability would be severely undermined if, once the contingency occurred, either party could suspend the agreement by simply filing a Section 6 notice proposing to amend the accord.

<sup>24</sup> Sections 5 and 10 of the RLA (45 U.S.C. 155, 160) contain similar provisions requiring the parties to maintain the status quo during subsequent steps of the bargaining process. Section 5 First provides that if the National Mediation Board's conciliation efforts fail, and the parties reject the Board's suggestion of arbitration, then for the next 30 days "no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose" (45 U.S.C. 155 First). Section 10, which governs the President's creation of an emergency board to report on labor disputes that threaten "to deprive any section of the country of essential transportation service" (45 U.S.C. 160), provides that "[a]fter the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose" (45 U.S.C. 160). As this Court has stated, while the "language of §§ 5, 6, and 10 is not identical in each case, we believe that these provisions, together with § 2 First [setting forth the duty to bargain] form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day 'cooling-off' period. Although these provisions are applicable to different stages of the Act's procedures, the intent and effect of each is identical so far as defining and preserving the status quo is concerned." *Detroit & T.S.L.R.R.*, 396 U.S. 142, 152 (1969) (footnote omitted).

Applying these principles to the present case, we believe that RLEA's filing of a Section 6 notice should not prevent P&LE from undertaking management initiatives that will reduce its work force, provided that those actions are taken in accordance with the railroad's present obligations to its employees as set forth in the existing agreements and understandings between the parties. The court of appeals rested its contrary conclusion on the belief that P&LE's proposed sale necessarily "would require a 'change in agreements affecting rates of pay, rules, or working conditions'" (87-1888 Pet. App. 17a) or would "change the nature of those agreements" (*id.* at 18a (emphasis in original)). But the court's factual premise is not well founded.

This Court has recognized that job security is a working condition that is subject to RLA collective bargaining. See *Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 332-338 (1960). As a result, collective bargaining agreements frequently address job security matters. Indeed, "in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment." *Id.* at 336. Agreements commonly state, or by their terms indicate, that an employer may make reductions in his work force or go out of business completely, and they often include job security provisions—including severance pay and reassignment opportunities—when the employer exercises that right. See, e.g., *Chicago & N.W. Transp. Co. v. Railway Labor Executives' Ass'n*, 855 F.2d 1277, 1284-1285 (7th Cir. 1988) (holding that labor force reductions were arguably comprehended within and potentially amenable to resolution by reference to the existing collective bargaining agreement), cert. denied, No. 88-464 (Nov. 28, 1988). Thus, the court of appeals' assumption that a railroad's decision to terminate its operations necessarily would require a change in its existing collective bargaining agreements is not accurate. Indeed, it would be anomalous to prohibit a railroad from employing collectively bargained job termination provisions exactly when those provisions should come into play.

The court of appeals further erred in concluding (87-1888 Pet. App. 17a) that this Court's decision in *Detroit & T.S.L.R.R. v. United Transp. Union (Shore Line)*, 396 U.S. 142

(1969), which stated that Section 6 requires the parties to preserve "actual, objective working conditions" (*id.* at 153) during the course of collective bargaining, requires that a closing railroad must always preserve its employees' jobs during the bargaining process. Although *Shore Line* may seem to support that result on a superficial reading, a careful examination of the opinion indicates that a railroad may make adjustments in its work force, even while it is engaged in collective bargaining, provided that either the collective bargaining agreement authorizes, or the actual work practices, allow for such adjustments. Thus, *Shore Line* holds that the existing collective bargaining agreement terms *and* (where the agreement is silent) the on-the-job practices define the "actual, objective working conditions." It follows that if the agreement or actual practices permit the employer to make unilateral work force reductions, that "working condition" is a part of the status quo.

In *Shore Line*, a railroad announced its intention to create "outlying" work assignments. Previously, certain employees had reported to work at a central location near their homes to be transported on the railroad's time and at the railroad's expense to their work assignments. The railroad proposed a change that would require these workers to commute on their own time and at their own expense to a work location at Trenton, Michigan, some 35 miles away. See 396 U.S. at 144. The employees' union filed a Section 6 notice proposing amendments to the collective bargaining agreement "to cover the changed working conditions of the employees who would work out of Trenton" (*id.* at 145). The railroad changed its plans, the union withdrew its Section 6 notice, and it subsequently brought an action before an adjustment board (see page 5, *supra*) to determine whether the collective bargaining agreement allowed the railroad to make outlying assignments (396 U.S. at 145). The adjustment board found that there was "nothing in the rules of [the collective bargaining] agreement which precludes this carrier from establishing an outside assignment" (*id.* at 146 n.9). The railroad reinstituted its outlying assignments proposal, and the union filed a new Section 6 notice, this time expressly seeking "to amend the agreement to forbid the railroad from making any outlying assign-

ments at all" (*id.* at 146). The union threatened to strike, the railroad sought an injunction, and the union counterclaimed, arguing that the Section 6 status quo requirement forbade the railroad from establishing the outlying assignments while bargaining was taking place (*id.* at 146-147).

When the case reached this Court, the railroad argued that the status quo consists "only of the working conditions specifically covered in the parties' existing collective-bargaining agreement" (396 U.S. at 143 (emphasis added)) while the union argued that the status quo consists of the "actual objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing collective agreement" (*ibid.* (emphasis added)). This Court agreed with the union (*id.* at 143), stating that the parties are obligated to:

preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.

*Id.* at 153 (footnote omitted). Thus, the Court did not hold that the employer must preserve jobs; it held, in accordance with Section 6's plain language, that the employer must preserve "working conditions" (45 U.S.C. 156). And the Court did not hold that a collective bargaining agreement, which by definition represents the parties' "agreement[ ] concerning rates of pay, rules, and working conditions" (45 U.S.C. 152 First), is not the primary source for determining what "working conditions" Section 6 preserves. The Court held only that relevant working conditions "need not be covered in an existing agreement" to qualify as part of the "actual, objective working conditions" that define the status quo. 396 U.S. at 153.<sup>25</sup>

<sup>25</sup> The Court's application of its reasoning to the facts before it aptly illustrates the principle. The Court recognized that a collective bargaining agreement could authorize outlying assignments. See 396 U.S. at 153-154. Furthermore, it stated that the railroad would not have been barred from imposing outlying assignments, even in the face of a Section 6 notice, "if, apart from the agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a

Accordingly, *Shore Line* properly recognizes that an employer-employee relationship rests *not only* on the collective bargaining agreement but also on the implicit understandings of the parties.<sup>26</sup> It follows that if either a collective bargaining agreement or on-the-job practices authorize the employer to reduce or eliminate his work force in accordance with specified terms and conditions, that is one of the "working conditions" that defines the status quo.

Section 6's language, the reasonable implications drawn from the RLA's structure and purpose, and this Court's *Shore Line* decision are therefore consistent in recognizing that the filing of a Section 6 notice does not necessarily require the employer to preserve "the very existence of the worker's jobs" (87-1888 Pet. App. 18a). Instead, it requires the parties to preserve the "working conditions" set forth in the collective bargaining agreement or grounded in implicit understandings based on past employment practice. The working conditions derived from these sources, in turn, may permit the employer to take unilateral actions, including reductions in force, with respect to his employees. The court of appeals accordingly erred in holding that the employer is absolutely precluded from taking such action during the course of effects bargaining.

The collective bargaining agreements between P&LE and its various unions are not a part of the record in this case. It therefore is necessary to remand this case to the district court for

part of the actual working conditions" (*id.* at 154). But the agreement in that case was silent with respect to outlying assignments, and the railroad's established practice, which grew up in the face of the agreement's silence, was for employees to report to work at a central location (*ibid.*). The Court accordingly concluded that defining the status quo solely by reference to the agreement would be untenable because it would allow a rail carrier to take unfair "advantage of the agreement's silence" (*id.* at 155) where in fact a working condition had become established through practice or custom.

<sup>26</sup> "It would be virtually impossible to include all working conditions in a collective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested [by the RLEA] that this practice is more frequent in the railroad industry than in most others" (396 U.S. at 154-155 (footnote omitted)). See also *id.* at 159-161 (Harlan, J., concurring in part and dissenting in part).

further proceedings. If the parties agree that the collective bargaining agreements (or the parties' implicit understandings) establish their respective rights in the present circumstances, then the agreement or other understandings will likewise establish the status quo.<sup>27</sup> In the more likely event that the parties disagree about their respective rights, the disagreement is subject to resolution—as in the case of all other disputes that relate "to the meaning or proper application of a particular [contract] provision with reference to a specific situation or to an omitted case" (*Elgin*, 325 U.S. at 723)—through the "minor" dispute provisions of the RLA. See *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 324 (1972).<sup>28</sup>

In sum, we submit that P&LE has a limited duty to bargain with its unions over the effects of its decision to sell its assets, but it is not obligated to bargain over proposals that would prevent the railroad from effectuating its decision. P&LE must maintain the status quo during the bargaining process. The status quo is defined, however, by the terms of the existing collective bargaining agreements and the implicit understandings of the parties. Any disagreements among the parties concerning those matters are subject to resolution in accordance with the RLA's "minor" dispute mechanisms.

<sup>27</sup> Where a collective bargaining agreement is silent on a given matter, the implicit understandings of the parties may derive from the common law rules that, in the absence of an express agreement, would determine the employment relationship. Thus, if the agreement is silent with respect to continued employment, the rights of the parties may be governed by the "the traditional common-law rule that a contract of employment is terminable by either party at will." *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 324 (1972).

<sup>28</sup> It is well settled that "if the subject matter of the parties' dispute is 'arguably comprehended' within, and potentially amenable to resolution by reference to, their existing collective bargaining agreements and the attendant established past practices" the matter constitutes a minor dispute that is subject to mandatory arbitration by the National Railroad Adjustment Board (NRAB) or by its statutory alternatives pursuant to 45 U.S.C. 153 First, Second. *E.g.*, *Chicago and N.W. Transp. Co. v. Railway Labor Executives' Ass'n*, 855 F.2d 1277, 1284 (7th Cir. 1988), cert. denied, No. 88-464 (Nov. 28, 1988). Our brief amicus curiae in *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, No. 88-1, provides a detailed discussion (at 10-20) of the minor dispute resolution mechanism.

### III. A Proper Interpretation of the Railway Labor Act's Status Quo Obligation Eliminates The Prospect Of An "Erosive" Taking In Violation of the Fifth Amendment

P&LE contends that the court of appeals' interpretation of the RLA's Section 6 status quo obligation, which requires the railroad to continue operations against its will at a financial loss, would violate the Takings Clause of the Fifth Amendment. See 87-1888 Pet. 26-27. P&LE bases its argument on the principle, recognized by this Court, that federal legislation requiring an insolvent railroad to continue public service at a loss pending reorganization efforts may result in an "erosive" taking if the railroad is forced to continue "compelled loss" operations beyond a reasonable time. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 122-136 (1974).

P&LE first raised this argument in the court of appeals and, as a result, it has not developed the factual record that normally is necessary to assess whether a statute actually results in a violation of the Fifth Amendment's proscription of uncompensated takings. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) ("whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case' "). We accordingly submit that any question of an erosive taking cannot be resolved here. We note, however, that if P&LE is correct that an erosive taking can arise in this context, then the RLA's status quo obligations should be construed to avoid that possibility. See, e.g., *Regional Rail Cases*, 419 U.S. at 134 (" 'construction should go in the direction of constitutional policy' ") (quoting *United States v. Johnson*, 323 U.S. 273, 276 (1944)). Our construction of the RLA status quo obligation is not only the most reasonable interpretation of the statutory language, it also eliminates any prospect of a Fifth Amendment violation. Obviously, the railroad can suffer no erosive taking if its obligation to remain in business results from consensual commitments set forth in its collective bargaining agreements or arises from its implicit understandings with its employees.

### CONCLUSION

The judgment of the court of appeals in No. 87-1589 should be affirmed, and the judgment of the court of appeals in No. 87-1888 should be affirmed in part, reversed in part, and remanded for further proceedings.

Respectfully submitted.

CHARLES FRIED

*Solicitor General*

THOMAS W. MERRILL

*Deputy Solicitor General*

JEFFREY P. MINEAR

*Assistant to the Solicitor General*

JANUARY 1989

## ADDENDUM

The ICA sets forth the following national rail transportation policy (49 U.S.C. 10101a):

### § 10101a. *Rail transportation policy.*

In regulating the railroad industry, it is the policy of the United States Government —

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

No. 87-1589

Supreme Court, U.S.

FILED

APR 19 1988

JOSEPH F. SPANIOLO, JR.

CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*  
v.  
RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Respondent.*

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Third Circuit

BRIEF FOR THE  
NATIONAL RAILWAY LABOR CONFERENCE AS  
AMICUS CURIAE IN SUPPORT OF THE PETITION

RICHARD T. CONWAY  
(Counsel of Record)  
RALPH J. MOORE, JR.  
D. EUGENIA LANGAN  
SHEA & GARDNER  
1800 Massachusetts Ave., N.W.  
Washington, D.C. 20036  
(202) 828-2000

DAVID P. LEE  
Vice Chairman & General Counsel  
National Railway Labor Conference  
1901 L Street, N.W.  
Washington, D.C. 20036  
(202) 862-7200

*Attorneys for Amicus Curiae*  
*National Railway Labor Conference*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

No. 87-1589

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*  
v.  
RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Respondent.*

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Third Circuit

BRIEF FOR THE  
NATIONAL RAILWAY LABOR CONFERENCE AS  
AMICUS CURIAE IN SUPPORT OF THE PETITION

This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 36.1.

## STATEMENT OF THE CASE

Under § 10901 of the Interstate Commerce Act ("ICA"), a non-carrier can acquire and operate a railroad line "only if the [Interstate Commerce] Commission finds that the present or future public convenience and necessity require or permit" that to be done. 49 U.S.C. § 10901(a). If the Interstate Commerce Commission ("ICC" or "Commission") so finds, it may approve the acquisition "with conditions the Commission finds necessary in the public interest . . . ." 49 U.S.C. § 10901 (c) (1) (A) (ii). The ICC thus has discretion to condition its approval, when in the public interest, upon protection

of employees who may be adversely affected by the acquisition.<sup>1</sup>

Under § 10505 of the ICA, the Commission "shall exempt a person, class of persons, or a transaction or service" from various regulatory provisions of the ICA if the application of those provisions "is not necessary to carry out the transportation policy" set forth in 49 U.S.C. § 10101a. 49 U.S.C. § 10505(a)(1). Among other things, however, such an exemption "does not relieve a carrier of its obligation to protect the interests of employees" insofar as such protection is afforded by the ICC under § 10901 or other provisions of the ICA. 49 U.S.C. § 10505(g)(2). And, the "Commission may revoke an exemption" when "necessary to carry out the transportation policy of section 10101a . . . ." 49 U.S.C. 10505(d). The ICC thus retains its regulatory jurisdiction over exempt transactions including any duty or discretion to require protection of adversely-affected employees.<sup>2</sup>

In *Ex Parte* No. 392 (Sub-No. 1), the ICC adopted under § 10505 a class exemption from the procedures that otherwise would apply to a line transaction under § 10901 and established expedited procedures under which, among other things, such a transaction could be consummated seven days after the filing of notice of the transaction

<sup>1</sup> See, e.g., *I.C.C. v. Railway Labor Assn.*, 315 U.S. 373 (1942) (predecessor provision); *People of State of Ill. v. United States*, 604 F.2d 519 (7th Cir. 1979), *cert. denied*, 445 U.S. 951 (1980); *Railway Labor Executives' Ass'n v. United States*, 697 F.2d 285 (10th Cir. 1983); *Railway Labor Executives' Ass'n v. I.C.C.*, 784 F.2d 959 (9th Cir. 1986); *Railway Labor Executives' Ass'n v. United States*, 791 F.2d 994 (2d Cir. 1986); *CMC Real Estate Corp. v. I.C.C.*, 807 F.2d 1025 (D.C. Cir. 1986).

<sup>2</sup> See, e.g., *United Transp. Union v. Norfolk and Western R. Co.*, 822 F.2d 1114, 1122-1123 (D.C. Cir. 1987), *cert. denied*, 56 U.S.L.W. 3457, 3460 (1988); *G. & T. Terminal Packaging v. Consolidated Rail*, 830 F.2d 1230, 1234-1235 (3d Cir. 1987), *cert. denied*, 56 U.S.L.W. 3682 (1988).

with the Commission. *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985) ("*Ex Parte* 392").<sup>3</sup>

Rejecting arguments by Respondent Railway Labor Executives' Association ("RLEA") to the contrary, the ICC concluded that employee protections normally should not be required as a condition upon transactions approved pursuant to that exemption procedure. 1 I.C.C.2d at 813-815. However, the ICC expressly reserved jurisdiction to "revoke the exemption, in whole or in part, and impose labor protection" upon "an exceptional showing of circumstances" in an individual case. 1 I.C.C.2d at 815. On appeal by RLEA and others, *Ex Parte* 392 was affirmed "for the reasons set forth in the decision of the Commission," in a *per curiam* judgment attached as Exhibit A hereto. See *Illinois Commerce Com'n v. I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987).

Petitioner, the Pittsburgh & Lake Erie Railroad Co. ("P&LE"), which is in dire financial condition, agreed to sell all its rail lines to a noncarrier pursuant to § 10901 and the *Ex Parte* 392 procedure. Notice of that transaction was filed with the ICC on September 19, 1987, the ICC denied RLEA's request for a stay of the effectiveness of the exemption under that procedure, and thus the ICC's exemptive approval of the transaction became effective on September 26, 1987. A petition by RLEA to revoke that exemption is pending before the ICC. In the meantime, however, the RLEA had filed a complaint with the district court below to enjoin the sale

<sup>3</sup> In a decision served on February 29, 1988 in *Ex Parte* 392 (Sub-No. 1), the ICC made some adjustments (not relevant here) in the procedures thus adopted, but concluded (page 2) that in general "the exemption process has been successful" and that the ability of new carriers under that process "to begin operations promptly is a key to the exemption's success" in facilitating the establishment of "new carriers" which "preserve service, jobs, and rail investment" and which "typically provide better service, more tailored to individual shippers' needs." See 53 Fed. Reg. 5981.

unless and until P&LE exhausted the procedures of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, through collective bargaining with RLEA's member unions over the carrier's decision to sell its rail lines and over the effects of any such sale upon its employees.<sup>4</sup> And, on September 15, 1987, the P&LE was struck by those unions.

On October 8, 1987, the district court preliminarily enjoined that strike (Pet. App. B.). Judge Bloch concluded that the strike was intended to negate the ICC's determination that employee protections should not be required in such § 10901 transactions; that the ICA relieved the P&LE of any duty to bargain with the unions that other-

<sup>4</sup> Those procedures include conferences, mediation and, at the discretion of the President, investigation and recommendations by an emergency board. See *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 378 (1969). With good reason, they have been characterized by this Court as "long and drawn out," *Railway Clerks v. Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966), as "almost interminable," *Shore Line v. Transportation Union*, 396 U.S. 142, 149 (1969), and "as virtually endless," *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, — U.S. —, 55 U.S.L.W. 4576, 4580 (1987). In NRLC's experience, it is not at all unusual for the exhaustion of those procedures to take two years or more. Moreover, if exhausted without agreement, the union may strike the railroad with which the dispute exists and secondarily picket all other railroads. *Burlington Northern, supra*. Requiring P&LE to exhaust those procedures would nullify the ICC's authorization of the sale. The lower courts almost uniformly have rejected complaints by RLEA and member unions seeking to enjoin such line sales on the basis of an alleged duty by the selling carrier to bargain with the unions under the RLA. See Pet. at 13-14. The sole exceptions are the decision by the district court, following the Third Circuit's remand in this case, reversing its prior decision on the RLA issue (see Pet. at 10-11); and the April 8, 1988 decision by the Third Circuit affirming that decision by the district court (Docket No. 87-3797). We understand that P&LE intends to petition for a writ of certiorari to review also that decision by the Third Circuit, which we believe to be erroneous. A grant of that petition and the instant petition will enable this Court to review all legal aspects of this line sale controversy.

wise might exist under the RLA; and that § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, must be accommodated to the purposes of the ICA and to the jurisdiction of the ICC thereunder to determine what employee protections, if any, should be required in § 10901 line sales. Pet. at B-7 and B-8. On October 26, 1987, the Third Circuit summarily reversed in an opinion that was limited to the Norris-LaGuardia issue (Pet. App. A.). While the Third Circuit acknowledged decisions by this Court holding that Norris-LaGuardia should be accommodated to other statutes "adopted as a part of a pattern of labor legislation," in its view § 10901 of the ICA is not such a statute because the "ICC's authority to consider the incidental effects of the transaction on labor and its discretionary authority to require provisions that protect employees do not make the Interstate Commerce Act comparable to the Railway Labor Act, which contains a comprehensive scheme of alternative dispute resolution mechanism." Pet. at A-6 and A-9.

#### INTEREST OF AMICUS CURIAE

The National Railway Labor Conference ("NRLC") is an unincorporated association which includes almost all of the nation's class I railroads among its members. NRLC represents member railroads in multi-employer collective bargaining under the RLA as well as in regard to a variety of other labor relations matters of concern to the railroad industry generally.

NRLC does not participate in and has no control over decisions by a member railroad to sell or otherwise dispose of a line, or as to whether to bargain with a union about such matters, or in any bargaining that may occur. On occasions in the past, however, NRLC has been confronted with union proposals for a national agreement in regard to protections for employees affected by a transaction approved by the ICC, has maintained that such issues should be determined by the ICC, and has

never agreed to such protections on behalf of members participating in such national bargaining. Since the decision below radically departs from what NRLC heretofore has understood to be the law, a reversal of that decision is of importance to NRLC in its role as the national bargaining representative for member railroads.

Reversal of that decision also is of paramount importance to the individual railroads, to potential future railroads that may acquire a line or lines from an existing railroad, and to shippers. The class I railroads long have been seriously handicapped in their efforts to operate profitably in the face of ever-increasing truck competition by obsolete work rules and a mileage basis of pay (in which 100 miles of operation generally was equated to eight hours of work), often dating back to the nineteenth century, which resulted in gross overmanning, a lack of flexibility in operating trains, and labor costs that often consumed 50% or more of gross operating revenues. Although some progress has been made, particularly in recent years, in negotiating collective bargaining agreements—including national agreements negotiated by the NRLC—that have afforded some amelioration, that usually has been the work of decades stretching over several rounds of bargaining, and much remains to be done. This situation has been a factor in the series of railroad bankruptcy that brought about creation of a government-subsidized Conrail out of the Penn Central and several other bankrupt northeastern railroads, without which much of the northeast could have been deprived of any railroad service; to the dismemberment in bankruptcy of such major railroads as the Milwaukee and the Rock Island; and to the abandonment of thousands of miles of track which often deprived agricultural areas, towns and even substantial cities, and of course shippers located therein, of railroad service.

In recent years, line sales to newly-created carriers have become an increasingly important aspect of efforts

to rationalize the railroad structure and thus to enable the railroad industry to compete more effectively while continuing to provide railroad service. This development, its causes and consequences, have recently been described by the ICC in *FRVR Corporation, Etc.*, Finance Docket No. 31205, served January 29, 1988, a copy of which is attached as Appendix B hereto (appeal pending, Docket No. 88-1280, 8th Cir.).

Since 1980, “nearly 200 short-line and regional railroads have come into existence—partially reversing the industry’s long trend of exit and contraction.” App. at 1a. This “trend away from abandonment and towards the formation of short-line and regional carriers . . . was given impetus by a change in 1982 in Commission labor protection policy . . . .” App. at 4a. Prior to that time, the Commission’s approval of a sale to a non-carrier “might have been conditioned upon comprehensive (and potentially quite expensive) labor protection,” but by 1982 the ICC “had determined that the expense of labor protection foreclosed short-line development, forcing the less attractive abandonment alternative . . . .” App. at 5a. The ICC thus exercised its discretion in individual cases to deny labor protection, and after “consideration of scores of individual applications, the Commission decided” in *Ex Parte 392* “that the development of new small railroads was overwhelmingly beneficial and should be encouraged and allowed to proceed with a minimum of regulatory cost and delay.” App. at 5a.

That “policy has been validated by practical results”— “[n]ew railroad formation quickened, abandonments fell, service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved.” App. at 6a. An analysis by the Commission’s staff demonstrated “that employment on the new lines, particularly the larger regional carriers, is typically drawn from the work force of the selling carrier.” App. at 6a n. 11. The employees of those new carriers, of course,

have the same right as employees of existing carriers under § 2 Ninth of the RLA to select, through the vote of a majority in a craft or class, a union to represent them in collective bargaining with that new carrier. 45 U.S.C. § 152 Ninth. However, even if the new carrier is a "successor" to the selling carrier in legal contemplation, it has no obligation to assume the collective bargaining agreements made by the vendor company. Rather, it may establish unilaterally the rates of pay, rules and working conditions applicable to its employees, so that the onus is upon the unions to bring about a change through the procedures of the RLA.<sup>5</sup> This new start in labor agreements is largely responsible, in NRLC's opinion, for the fact found by the ICC that "[m]arkets that produce losses when operated by Class I railroads can produce profits for smaller, more efficient local carriers." App. at 4a.

Although this ICC policy facilitating line sales generally has been "supported and welcomed," it "has been consistently opposed by organized rail labor." App. at 6a-7a. The rail unions recently have extended that opposition from arguments to the ICC, and on appeal therefrom to the courts, to a concerted campaign, apparently coordinated by the RLEA, of litigation and strikes or threatened strikes contesting the implementation of authorized line sales, in reliance upon the RLA and Norris-LaGuardia. While much of the resulting litigation is still working its way through the lower courts, that cam-

<sup>5</sup> Those principles have been established by this Court under the National Labor Relations Act, in decisions recently reaffirmed and amplified in *Fall River Dyeing & Finishing Corp. v. NLRB*, — U.S. —, 55 U.S.L.W. 4706 (1987). They have been applied by the lower courts under the RLA, and apparently no longer are contested by the railroad unions. See, e.g., *Matter of Chicago, M., St. P. & Pac. R. Co.*, 658 F.2d 1149, 1174-1175 (7th Cir. 1981), cert. denied sub nom., *RLEA v. Olgivie*, 455 U.S. 1000 (1982); *Brotherhood of Railway, Etc. v. REA Express Inc.*, 523 F.2d 164, 170 (2d Cir. 1975), cert. denied, 423 U.S. 1017, 1073 (1976).

paign was unsuccessful insofar as judicial decisions are concerned (although sometimes successful in delaying implementation of approved transactions pending decision) until the decision by the Third Circuit in this case. As the ICC also found, that "decision has had an immediate impact on the formation of small railroads," and is "threatening to halt the revitalization of the marginal railroad sectors—a restructuring that the Commission has found to be in the interest of carriers, labor, and the shipping public." App. at 12a.

The interest of the NRLC and of member carriers in securing a reversal by this Court of that decision not only is obvious, therefore, but also accords with the public interest as found by the ICC.

#### REASONS FOR GRANTING THE WRIT

The Petition presents an important issue of law, involving the relationship between the ICA and the Norris-LaGuardia Act, which was wrongly decided by the court below in an opinion which conflicts with principles established by this Court and applied by other courts of appeals.

##### A. The Issue Presented Is Important.

Briefly stated, the Congress has given the ICC discretionary jurisdiction to determine whether protections for employees (and the extent of such protections if ordered) is in the public interest when a line sale is authorized under § 10901 of the ICA; the ICC has determined pursuant to that jurisdiction as a matter of general policy that employee protections are not in the public interest and will not be imposed in the absence of exceptional circumstances; that policy determination has been sustained by the federal courts on direct review instigated by, and over the opposition of, RLEA among others; the ICC has applied that general policy in authorizing the sale of P&LE's lines without labor protections; the RLEA

struck the P&LE so as to prevent implementation of that sale without the employee protections which it demands; the Third Circuit, without in any way questioning the ICC's jurisdiction or the validity of its authorization of the sale, has held that Norris-LaGuardia deprives the federal courts of jurisdiction to enjoin that strike; and the ICC, as well as the P&LE, the NRLC and others, disagrees with that decision.

This case thus presents an apparent conflict between important federal statutes, and a disagreement between a federal court and a federal agency as to how that issue should be resolved, which this Court should resolve even if the underlying issue were not of much intrinsic importance. But however that may be, the importance of that issue in itself can hardly be gainsaid. We need not repeat, although we reiterate, the foregoing explanation (pp. 6-9 *supra*) of the importance of line sales to the railroad industry and to the public—and thus of the decision below which threatens to prevent the consummation of such sales despite their authorization by the ICC. The efforts by the RLEA and member unions to frustrate such government-authorized sales, through reliance upon the RLA and the Norris-LaGuardia Act, is the most-litigated and most important railway labor-management controversy now facing the federal courts. Review by this Court of the decision below should go far towards laying that controversy to rest.<sup>6</sup>

#### B. The Decision Below Is Wrong.

The Congress enacted the Norris-LaGuardia Act in 1932 (47 Stat. 70) "to remedy the growing tendency of

<sup>6</sup> Moreover, while line sales to new carriers are the heart of the current controversy, the ramifications of the decision below are not limited to such transactions. The ICC also has jurisdiction (including the employee protections, if any, to be imposed) over many other railroad transactions, such as abandonments and a variety of multicarrier transactions, including mergers, consolidations, and line sales to existing carriers. See pp. 13-16 *infra*.

federal courts to enjoin strikes by narrowly construing the Clayton Act's labor exemption from the Sherman Act's prohibition against conspiracies to restrain trade . . . ." *Jacksonville Bulk Terminals v. Longshoremen*, 457 U.S. 702, 708 (1982).<sup>7</sup> Although this Court "has consistently given the anti-injunction provisions of the . . . Act a broad interpretation," the Court also has held those provisions to be inapplicable "where necessary to accommodate the Act to specific federal legislation or paramount congressional policy." *Ibid.* In short, the "accommodation" doctrine simply reflects the general rule of "[s]tatutory interpretation" that "consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Boys Markets v. Clerks Union*, 398 U.S. 235, 250 (1970). Among other things, this means that Norris-LaGuardia is accommodated so that it does not prevent the effectuation of statutes in which "congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Id.* at 251 (emphasis added). See also, *e.g.*, *Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 39-42 (1957).

Although the Third Circuit acknowledged that Norris-LaGuardia should be accommodated when "necessary to enforce some other overriding and equally clear federal labor policy," (Pet. at A-6), in its view § 10901 is not "a labor law" (Pet. at A-8) because protection of the interests of labor is only one of "fifteen policies relevant to the regulation of the railroad industry" set forth in the national transportation policy, 49 U.S.C. § 10101a. Pet. at A-7. "The ICC's authority to consider the inci-

<sup>7</sup> "The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act . . . , which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent." H. Rept. No. 669, 72d Cong., 1st Sess. (1932) at 3.

dental effect of the transaction on labor and its discretionary authority to require provisions that protect employees do not make the Interstate Commerce Act comparable to the Railway Labor Act, which contains a comprehensive scheme of alternative dispute resolution mechanisms." Pet. at A-9.<sup>8</sup>

This grudging acknowledgment of the accommodation doctrine would convert that doctrine into a mechanical comparison of other statutory provisions to the RLA rather than a consideration of "the total corpus of pertinent laws and the policies that inspired ostensibly inconsistent provisions" so as to accommodate Norris-LaGuardia "to specific federal legislation or paramount federal policies." But even on the Third Circuit's terms, the jurisdiction of the ICC to determine the extent of labor protections to be imposed in authorizing line sales under § 10901 of the ICA surely constitutes "an overriding and equally clear federal labor policy." The Congress has thus provided an "administrative technique[] for the peaceful resolution" of labor disputes at least as clearly as it did in requiring the arbitration of grievance disputes under the RLA to which Norris-LaGuardia was accommodated in *Chicago R. & I.R. Co.*, *supra*, or in authorizing agreements to arbitrate grievance disputes by

<sup>8</sup> The Third Circuit also erred in relying upon *Telegraphers v. Chicago & N.W. R. Co.*, 362 U.S. 330 (1960). See Pet. at A-9 and 10. While some of the station closings were approved by state regulatory agencies, that was done pursuant to state law (rather than pursuant to the ICA as the Third Circuit erroneously stated). See 362 U.S. at 332-333, 347-348, 353 & n.18. *Telegraphers* did reject an "argument that the operation of unnecessary stations . . . runs counter to the congressional policy . . . to foster an efficient national railroad system," 363 U.S. at 342, but that argument was based upon the general transportation policies of the ICA rather than upon a specific statutory provision, such as § 10901, requiring ICC approval of a transaction and empowering that agency to condition its approval upon employee protections when in the public interest.

employees and unions under the National Labor Relations Act to which Norris-LaGuardia was accommodated in *Boys Markets*, *supra*. Indeed, line sales under § 10901 are only one of numerous categories of railroad transactions for which ICC approval is required under the ICA in proceedings that include consideration of labor protections.

The Transportation Act of 1920 (41 Stat. 456) amended the ICA to include provisions giving the ICC jurisdiction over abandonments, line sales to non-carriers and other single-carrier transactions (§§ 1(18) and (20), 41 Stat. 477-478), and over mergers and other multicarriers transactions (§ 5(2), 41 Stat. 481), and also enacted the predecessor of the RLA (41 Stat. 469-474). In *United States v. Lowden*, 308 U.S. 225, 235 (1939), this Court described both aspects of that 1920 Act as part of the "now extensive history of legislation regulating the relations of railroad employees and employers." The Court confirmed the discretionary authority of the ICC to condition its approval of mergers and other multicarrier transactions pursuant to § 5(2) of the amended ICA upon protection of employees when in the public interest. That authority may "promote the public interest in its statutory meaning by facilitating the national policy of railroad consolidation" by, among other things, "prevent[ing] interruption of interstate commerce through labor disputes growing out of labor grievances . . . ." 308 U.S. at 238.

In *ICC v. Railway Labor Assn.*, 315 U.S. 373 (1942), this Court held that the ICC had the same discretionary authority to condition its approval of abandonments and other single-carrier transactions pursuant to §§ 1(18) and (20) of the amended ICA upon protection for employees. As is true of the comparable "public interest" standard involved in *Lowden*, those provisions required consideration of "the national interest in the stability of the labor supply available to the railroads," as the "possible unstabilizing effects on the national railroad system"

of labor problems "are no smaller in the case of an abandonment like the one before us than in a consolidation like that involved in the *Lowden* case." 315 U.S. at 377.

The Transportation Act of 1940 (54 Stat. 898) amended § 5 of the ICA to mandate employee protections as a condition upon the ICC's approval of mergers and other multicarrier transactions thereunder (§ 5(2)(f), 54 Stat. 906-907). That provision merely gave "legislative emphasis to a policy and practice already recognized by § 5(4)(b) by making the practice mandatory instead of discretionary . . . ." *United States v. Lowden*, *supra*, 308 U.S. at 239; *accord*, *ICC v. Railway Labor Assn.*, *supra*, 315 U.S. at 379. Indeed, those mandatory protections constituted a minimum and the ICC retained discretion to impose additional labor protections. *Railway Labor Assn. v. United States*, 339 U.S. 142 (1950). But in thus mandating employee protections as to approved mergers, etc., the Congress had modified a proposed Harrington Amendment which otherwise "threatened to prevent all consolidations to which it related" by prohibiting ICC approval "if such transaction will result in unemployment or displacement of employees . . . or in the impairment of existing employment rights of said employees." 339 U.S. at 150-151. Thus, even as to such transactions, the Congress intended to require only limited compensatory protections rather than a job freeze. *Maintenance Employees v. United States*, 366 U.S. 169, 174-177 (1961).

The Railroad Revitalization and Regulatory Reform Act of 1976 (90 Stat. 31) included provisions, enacted as § 1a of the ICA (90 Stat. 127-130), separating abandonments from other single-carrier transactions which had been governed by § 1(18) and mandating employee protections for certain approved abandonments (§ 1a(4), 90 Stat. 128). However, the Commission retained "wide discretion" to fit employee protections "to the facts and circumstances attending a particular abandonment," including the imposition of "labor protection only upon the

existing carrier, not upon a non-carrier that may acquire an abandoned line in order to resume service," and "refrain[ing] from imposing any labor protection at all . . . in whole line abandonments." *Simmons v. ICC*, 697 F.2d 326, 335-336 (D.C. Cir. 1982). The ICC continued to have discretion under § 1(18) as reenacted (90 Stat. 123-124) to determine what employee protections, if any, are in the public interest in regard to line sales to non-carriers. *People of State of Ill. v. United States*, *supra*, 604 F.2d at 524-527.

The ICA was codified and reenacted in 1978 as Subtitle IV of 49 U.S. Code. 92 Stat. 1337. The authority of the ICC over line sales and other single-carrier transactions apart from abandonments was codified as § 10901; its authority over abandonments was codified as § 10903; and its authority over mergers and other multicarrier transactions was codified as §§ 13341-13347; all without substantive change. The Staggers Act of 1980 (94 Stat. 1895) further amended the ICA to provide for mandatory or discretionary labor protections in connection with the abolition of rate bureaus (Sec. 219(g), 94 Stat. 1928), feeder line sales (49 U.S.C. § 10910(j)), reciprocal switching agreements (49 U.S.C. § 11103(c)(2)), and the construction of new rail lines (49 U.S.C. § 10901(e)). Moreover, the Congress precluded any employee protections in establishing a procedure (49 U.S.C. § 10905) for sales, including forced sales, of lines approved by the ICC for abandonment. *Railway Labor Executives' Ass'n v. United States*, *supra*, 791 F.2d at 1001-1003; *Simmons v. ICC*, 760 F.2d 126 (7th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

Hence, as the ICC has observed, since the provisions initially enacted by the Transportation Act of 1920 "Congress has routinely affirmed and expanded the importance of the Interstate Commerce Act as a part of the complex of laws governing labor relations in the rail industry . . . . For more than fifty years the Commission has

exercised its authority in this field, frequently at the request and with the support of labor, and our decisions have had enormous impact on the shape of rail labor relations throughout this period." *FRVR Corporation*, App. at 14a-15a.<sup>9</sup> Surely, those provisions of the ICA and the decisions of the ICC and the courts thereunder are "a part of the pattern of labor legislation" to which *Norris-LaGuardia* at the minimum should be accommodated.

Despite the view of the court below to the contrary, that is no less true because the ICC in carrying out its functions under § 10901 and related provisions of the ICA must take into consideration policies and interests in addition to the interests of rail labor. We agree with the ICC, as stated in *FRVR Corporation* (App. at 17a):

"That the concern for labor equity is only one of many conflicting aspects of National Transportation Policy should not be seen as derogation of the agency's authority—rather it is precisely the reason why the Interstate Commerce Act must be recognized to have preeminence. It is the public policy of this Nation to regulate and supervise transportation at the na-

<sup>9</sup> The Congress also has statutorily dealt with the issue of protection for railroad employees in the Rail Passenger Service Act of 1970, 45 U.S.C. §§ 501 *et seq.*, which created Amtrak (see 84 Stat. 1337, as amended, 45 U.S.C. § 565); in the Regional Rail Reorganization Act of 1974, 45 U.S.C. §§ 701 *et seq.*, which created Conrail (see Title V, 87 Stat. 1012-1020, which as thereafter amended was repealed by the Northeast Rail Services Act of 1981, 95 Stat. 669; which also enacted substitute—and reduced—labor protections as Title VII of the 3-R Act, 45 U.S.C. §§ 797 *et seq.*); in the Milwaukee Railroad Restructuring Act of 1979, 45 U.S.C. §§ 901 *et seq.*, which governed the dismemberment of the bankrupt Milwaukee railroad (see 93 Stat. 740-746, as amended, 45 U.S.C. §§ 907-912, 915); and in the Rock Island Railroad Employee Assistance Act of 1980, 45 U.S.C. §§ 1001 *et seq.*, which generally concerned protection for employees affected by the dismemberment of the bankrupt Rock Island railroad.

tional level so as to ensure the essential benefits of a critical aspect of commerce. While the means of regulation have changed markedly over the decades, the exclusive and plenary nature of the Commission's jurisdiction over consolidations, sales and abandonments have been consistently upheld. In the discharge of our responsibilities, we are charged with the expert resolution of many-sided conflicts between disputants, public and private. The recitation above of the factors leading to our [*Ex Parte 392*] policy illustrates the complexity of the process and information that led to our present policy."

Although the purposes of the Federal Railroad Safety Act (45 U.S.C. §§ 421 *et seq.*) extend beyond the safety of employees (see 45 U.S.C. § 421), it has been held that *Norris-LaGuardia* does not prevent an injunction prohibiting a strike over a dispute as to whether hazardous conditions justify an employee's refusal to work in view of a FRSA provision making such disputes arbitrable (45 U.S.C. § 441(c)). *Boston and Maine Corp. v. Lenfest*, 799 F.2d 795, 800-804 (1st Cir. 1986), *cert. denied*, 55 U.S.L.W. 3571 (1987). "Only the availability of injunctive relief can insure that the FRSA will operate consistently with its purpose . . . to give employees the right to avoid hazardous conditions on the railroad, and to channel any such dispute into binding arbitration." *Id.* at 803. So, too, only the availability of injunctive relief can insure that the ICA can operate consistently with its purpose that the ICC determine whether line sales and various other railroad transactions are in the public interest and to resolve any dispute as to the employee protections to be provided in connection with such transactions.

Insofar as we have discovered, there is not a word in the legislative histories of the statutory provisions conferring upon the ICC jurisdiction over line sales and other railroad transactions which indicates that the Congress either contemplated or intended that rail labor

would nonetheless have the power to block effectuation of an approved transaction through strikes and picketing, either because Norris-LaGuardia would prevent an injunction against such strikes and picketing or otherwise. Certainly, none has been cited by RLEA or by the court below.

In *Missouri Pacific R. Co. v. United Transp. Union*, 782 F.2d 107, 111-112 (8th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3837 (1987), the Eighth Circuit held that Norris-LaGuardia must be accommodated to the power of the ICC to authorize multicarrier transactions (in that case, a trackage right agreement). Otherwise, a union could "frustrate . . . a consolidation approved by the ICC," and "Congress did not intend that affected employees have such power to block consolidations which are in the public interest." *Ibid.* That is equally true in regard to § 10901 line sales that the ICC has found to be in the public interest. This is particularly so since the Congress, in providing "administrative processes for the peaceful resolution" of labor disputes concerning the protection of employees affected by an approved transaction, has enabled the unions to present their views in that regard to the ICC and, on appeal therefrom, to the courts, just as the RLEA did in the *Ex Parte 392* proceeding. As the Eighth Circuit further stated in *Missouri Pacific*, it "is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired." 782 F.2d at 112.

We submit that the Eighth Circuit in *Missouri Pacific* correctly applied the accommodation doctrine as explained by this Court while the Third Circuit in the case now before this Court did not. But however that may be, this Court should take this opportunity to leave no doubt about the correct resolution of this important issue.

## CONCLUSION

For the reasons stated above and in P&LE's Petition, this Court should grant a writ of certiorari and review the decision by the Third Circuit.

Respectfully submitted,

RICHARD T. CONWAY  
(Counsel of Record)

RALPH J. MOORE, JR.

D. EUGENIA LANGAN

SHEA & GARDNER

1800 Massachusetts Ave., N.W.

Washington, D.C. 20036

(202) 828-2000

DAVID P. LEE

Vice Chairman & General Counsel

National Railway Labor Conference

1901 L Street, N.W.

Washington, D.C. 20036

(202) 862-7200

*Attorneys for Amicus Curiae*

*National Railway Labor Conference*

Date: April 19, 1988

## **APPENDICES**

1a

APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 86-1107  
86-1131

ILLINOIS COMMERCE COMMISSION, *et al.*,  
*Petitioners*

v.

ICC & USA,  
*Respondents*

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Petition for Review of an Order of the  
Interstate Commerce Commission

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Before: EDWARDS and SILBERMAN, *Circuit Judges*,  
and *District Judge* PARKER,\* United States District  
Court for the District of Columbia

JUDGMENT

[Filed May 12, 1987]

This cause came on to be heard on a petition for review of an order of the Interstate Commerce Commission, and was briefed and argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c). On consideration thereof, it is

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\* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1982).

ORDERED and ADJUDGED, by this Court, that the petition for review of the order of the Interstate Commerce Commission in this matter is hereby denied for the reasons set forth in the decision of the Commission. It is

FURTHER ORDERED, by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

*Per Curiam*  
FOR THE COURT

/s/ George A. Fisher  
GEORGE A. FISHER  
Clerk

## APPENDIX B

[Service Date Jan. 29, 1988]

INTERSTATE COMMERCE COMMISSION  
DECISION  
FINANCE DOCKET NO. 31205

FRVR CORPORATION—EXEMPTION ACQUISITION AND  
OPERATION—CERTAIN LINES OF CHICAGO AND  
NORTH WESTERN TRANSPORTATION COMPANY—  
PETITION FOR CLARIFICATION

Decided: January 28, 1988

This decision is issued in response to a petition filed by the Chicago and North Western Transportation Company (CNW) and FRVR Corporation. FRVR is a new corporation formed for the purpose of acquiring and operating certain rail lines of the CNW. Petitioners seek a statement of this agency's views as to our jurisdiction over labor issues arising out of the formation of short-line railroads. The matter has become controversial in the past several years, due to the acceleration in the creation of regional and short-line railroads.

Since partial deregulation under the Staggers Rail Act of 1980<sup>1</sup> nearly 200 short-line and regional railroads come into existence—partially reversing the industry's long trend of exit and contraction. These new roads now operate approximately 13 thousand miles of rail lines with 4 thousand workers handling more than 1.3 million carloads yearly.

<sup>1</sup> Pub. L. No. 96-448, 94 Stat. 1941-45.

Up until the Staggers Act, the principal means of exit for large "Class I" railroads from unprofitable markets had been through abandonment. Substantial deregulation of motor freight under the 1980 Motor Carrier Act<sup>2</sup> threatened to accelerate this trend through new and increasingly efficient truck competition. Abandonment, by its nature, is most often a painful, disappointing process. It normally entails the permanent loss of jobs and railroad service, even though it has not always occurred in markets that are inherently unserviceable by rail. Markets that produce losses when operated by Class I railroads can produce profits for smaller, more efficient local carriers. These new carriers are potentially beneficial to nearly all concerned. They preserve rail service for the local economies and provide traffic feed for the larger carriers, enhancing employment prospects for rail labor—both on the smaller lines and throughout a reinvigorated Class I system—and they foster optimal recognition of the energy efficiencies and environmental benefits of rail service.<sup>3</sup>

The trend away from abandonment and towards the formation of short-line and regional carriers developed in response to the new business environment created by the Staggers Act. This development was given impetus by a change in 1982 in Commission labor protection policy which was in part based upon a provision of the Staggers Act which establishes a branch line sale process in which labor protection was foreclosed by the statute.<sup>4</sup> In the

<sup>2</sup> Pub. L. No. 96-296, 94 Stat. 793.

<sup>3</sup> The National Rail Transportation Policy charges the Commission with the responsibility of ensuring the development of a sound rail transportation system, while encouraging fair wages and safe and suitable working conditions for labor. The Commission is also to encourage and promote energy conservation. See 49 U.S.C. 10101a.

<sup>4</sup> 49 U.S.C. 10905. See *Simmons v. ICC*, 760 F.2d 126 (7th Cir. 1985).

past, the typical sale of a short-line carrier might have been conditioned upon comprehensive (and potentially quite expensive) labor protection.<sup>5</sup> By 1982 the Commission had determined that the expense of labor protection foreclosed short-line development, forcing the less attractive abandonment alternative or an abandonment and sale under the provisions of 49 U.S.C. 10905. As labor protection in short-line sales to new entrants is within the Commission's discretion, the Commission began to withhold protection in individual applications<sup>6</sup> on the three-part theory that (1) in doing so rail service would be preserved, (2) the new railroads provided the best prospect for protecting the employment prospects of the affected labor and (3) it made no sense to force railroads to go through the more cumbersome process of abandonment under 49 U.S.C. 10903 and sale under 49 U.S.C. 10905 to achieve the same result. After consideration of scores of individual applications, the Commission decided in a 1986 notice and comment rulemaking that the development of new small railroads was overwhelmingly beneficial and should be encouraged and allowed to proceed with a minimum of regulatory cost and delay.<sup>7</sup> The Commission issued rules exempting certain classes of line sales from drawn out Commission regulation, retaining for itself the unqualified right to review and correct any

<sup>5</sup> See e.g., *Durango and Silverton Narrow Gauge Railroad Co.—Acquisition and Operation*, 363 I.C.C. 292 (1979), *aff'd sub nom. Railway Labor Executives' Association v. United States*, 697 F.2d 285 (10th Cir. 1983) (Review Board decision noting that imposition of labor protection was discretionary).

<sup>6</sup> See *Knox and Kane Railroad Co.—Gettysburg Railroad Co.—Petition for Exemption*, 366 I.C.C. 439 (1982).

<sup>7</sup> Ex Parte No. 392 (Sub No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, *aff'd sub nom. Illinois Commerce Commission v. I.C.C.*, 817 F.2d 145 (DC Cir. 1987). This decision is in keeping with the National Transportation Policy of minimizing the need for Federal regulation (49 U.S.C. 10101a(2)), as well as the policies noted in footnote 3 above.

unique problems that might arise out of exceptional circumstances.<sup>8</sup>

The Commission's policy has been validated by practical results. New railroad formation quickened,<sup>9</sup> abandonments fell,<sup>10</sup> service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved.<sup>11</sup> Most observers supported and wel-

<sup>8</sup> The Staggers Act expanded the Commission's exemption authority. Further, as is stated in the Conference Report, the Commission is *actively* to pursue exemptions for transportation and is to have a policy of reviewing carrier actions *after the fact* to correct abuses. See H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 104-105.

9 New Railroad Formation	
Year Est.	Number
1982	25
1983	20
1984	31
1985	28
1986	45
1987 *	70

\* Preliminary figure based on notices filed.

10 Miles of Lines Abandoned	
Year	Miles
1982	5151
1983	2454
1984	3083
1985	2343
1986	2087
1987	1932

<sup>11</sup> The Commission's Office of Transportation Analysis is engaged in continuing study and research on the effect of the Commission's policy and the short-line/regional phenomenon. This study has included on-site interviews with labor and management, as well as data collection and analysis. This analysis demonstrates that employment on the new lines, particularly the larger regional carriers, is typically drawn from the work force of the selling carrier. Further, while initial employment levels are below those of the departing carrier, employment on some lines has grown over time as improved service attracts new business to the lines.

comed the Commission's policy initiative, but it has been consistently opposed by organized rail labor. Under the rules adopted in 1986, opposition to individual transactions is presented in petitions to revoke the grant of exemption. Such petitions have been filed in approximately 20 of the 120 transactions processed under the 1986 rules. Where petitions to revoke are filed, the Commission evaluates the basis for the revocation request, and has well-defined authority to correct any abuses that are shown.<sup>12</sup> The Commission's authority includes the power to impose labor protective conditions through partial revocation,<sup>13</sup> although under the rules this step will be taken only where exceptional circumstances are shown. The Commission would consider as exceptional, situations in which there was misuse of the Commission's rules or precedent,<sup>14</sup> or where existing contracts specified that line sales were subject to procedural or substantive protection.<sup>15</sup> Further, the exemption will be modified where labor can demonstrate injury that was unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination of the transaction or substantially undoing

<sup>12</sup> See *Consolidated Rail Corporation—Declaratory Order—Exemption*, 1 I.C.C.2d 895 (1986), cited approvingly, *GAT Terminal Packaging Co., Inc. v. Consolidated Rail Corp.*, CA 84-1173 Slip op. (D.N.J. October 23, 1986). See also legislative history of the Staggers Act in footnote 8 above.

<sup>13</sup> See *Maryland Midland Railway, Inc.—Exemption from 49 U.S.C. 11343 and 11301* (not printed), served January 6, 1987.

<sup>14</sup> Cf. Order of Investigation, served May 18, 1987, in F.D. No. 30965, *Delaware and Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*.

<sup>15</sup> It is the Commission's standard labor protection policy in restructuring proceedings to preserve existing employment contracts insofar as possible, consistent with the merger, consolidation or abandonment authorized. See section 2 of the standard *New York Dock* conditions, 360 I.C.C. 84 (1979).

the prospective benefits of the Commission's existing policy for other communities and locales.<sup>16</sup>

The exemption proposal filed by CNW and FRVR corresponds quite well to our expectations and experience with the use of the Ex Parte 392 (Sub-No. 1) rules. At issue are 208 miles of light density lines in Eastern Wisconsin in the area between Green Bay and Milwaukee. The paper industry is the principal source of traffic and holds the greatest potential for traffic growth on the FRVR line. But to achieve growth means reversing the paper industry's increasing reliance on truck service. A verified statement filed by Petitioners indicates that rail market share of the outbound paper market was 54 percent of the total in 1977, but had fallen to under 20 percent by 1986. The number of motor carriers operating in the region has doubled and price competition is strenuous. The lines of the CNW may now be under additional pressure since its rail competition (which had been the Soo Line operating at relatively standard Class I costs) is a new regional operator, the Wisconsin Central. Wisconsin Central, as organized, has distinct cost advantages that will make long-term competition by CNW almost certainly impossible, absent a substantial improvement in efficiency and productivity.<sup>17</sup>

To work its way out of this predicament, CNW seeks to sell its line to the newly formed FRVR. FRVR has a management team drawn from the Wisconsin area and from which the rail industry, with experience in running a small railroad and marketing rail transportation to the paper industry. It intends to draw its work force from existing CNW employees where possible, and anticipates

<sup>16</sup> Cf. *Northern Pacific Acquiring Corp. and Eureka Southern Railroad Co.—Exemption* F.D. 30555 (Decision served January 8, 1988).

<sup>17</sup> Two petitions to revoke the Wisconsin Central exemption (F.D. No. 31102) are now before the Commission.

that it will operate as a union-represented company.<sup>18</sup> Its wage rates will be approximately 85 percent of the Class I standard, and its work rules will give it substantial productivity improvement over the CNW operations. The company also anticipates use of an incentive bonus plan to further productivity. It will own its own engines, operate its own facilities, and rely principally on the CNW for car supply. It has trackage rights over CNW to connect into Milwaukee, and it has connections with other roads at points on the system. The company has already contacted shippers along the lines, and it filed 25 shipper letters acknowledging anticipated support and cooperation with its petition.

CNW estimates that the impact of the sale on its employees will be minimized by FRVR's commitment to the use of former CNW employees. For its part, CNW states that it has employment shortages elsewhere on its system, and that it will make these jobs available to workers affected by the FRVR sale. It anticipates that approximately 20 employees might still be left without employment either on FRVR or the CNW. It has offered a commitment of \$30,000 per employee as a separation allowances for any employee unable to secure continued employment with either CNW, by exercising seniority, or with FRVR, under the right of first hire.<sup>19</sup> CNW has offered to meet with its unions to discuss this offer and related issues. According to Petitioner, the unions believe that such discussions must proceed under the auspices of

<sup>18</sup> Verified Statement of S. P. Selby. Selby states that CNW employees currently working on the affected lines are granted right of first hire selected in accordance with qualifications, work records, fitness and ability, and physical and medical standards. Selby states further that he has met with an officer of the Railway Labor Executive's Association to work out a suitable arrangement for union representation of future employees. V.S., at 3-4.

<sup>19</sup> Verified statement of Robert Schmiede.

the Railway Labor Act (RLA).<sup>20</sup> Bargaining under the RLA requires maintenance of the status quo, and permits resort to strikes, lockouts or other form of self-help if an impasse cannot be mediated. CNW takes the position that such bargaining gives labor the power to defeat the FRVR transaction, and is not required. However, informal discussions have taken place, but no agreements have been reached.

CNW has petitioned for a declaration as to the Commission's view of its role in resolving any labor disputes which may arise in connection with the implementation of this Commission authorized transaction.<sup>21</sup> CNW asserts such an action is required to ensure a smooth implementation of the authorized transaction.

The Railway Labor Executives' Association (RLEA) has filed in opposition to the Petition of FRVR and CNW. RLEA believes that the Commission is without jurisdiction to issue the clarifying decision requested by Petitioners, and that Petitioners' argument on the merits is based on erroneous legal interpretations.

### DISCUSSION AND CONCLUSIONS

The first of RLEA's propositions appears to be based on a misapprehension of the nature of a declaratory order. It seems beyond question that the Commission has the authority to issue declaratory opinions.<sup>22</sup> RLEA does

<sup>20</sup> 45 U.S.C. 151.

<sup>21</sup> Pursuant to our class exemption rules, 49 CFR 1150.31 *et seq.*, the CNW/FRVR exemption became effective December 30, seven days after filing. Petitioners indicated that they intend to defer consummation until the Commission responds to their petition for clarification. A related petition for exemption of a control relationship between FRVR and its parent corporation has also been filed.

<sup>22</sup> Pursuant to 5 U.S.C. 554(e), an administrative agency is empowered in its discretion to issue declaratory orders to terminate controversy or remove uncertainty.

not directly address this authority, arguing instead that the Interstate Commerce Act (ICA) does not vest this agency with the power "to decide the applicability and scope of other statutes"—that the "Commission is clearly not the tribunal to determine how to resolve conflicting mandates of the ICA and other statutes." That is true enough, if understood to mean that the Commission's opinions on statutory interpretation are, when challenged, subject to judicial review and possible override. There is no dispute over the fact of judicial primacy, but it does not follow that the Commission is foreclosed from expressing its viewpoint, or that such expressions may not issue in declaratory form, when related to the discharge of explicit statutory power, such as the power to approve or exempt the sale of a line of railroad. There is no need to deprive private parties and reviewing courts of the benefit of a clear statement of the Commission's viewpoint. The reason for declaratory opinions is to aid in clarifying and resolving controversies.

A part of the present controversy that requires clarification is whether the Railway Labor Act must be accommodated (in RLEA's words, subordinated) to the Interstate Commerce Act in the circumstances of an approved or exempted line sale arising under section 10901 of the ICA. A related issue is the immunity from injunction under the Norris-LaGuardia Act of a strike that threatens to prevent the consummation of a transaction so approved or exempted.

Until quite recently, it had been an established rule that the orders of the Commission approving the merger, sale, or abandonment of a line of railroad were not subject to collateral attack in the courts, and could not be frustrated by employee actions taken under the aegis of the Railway Labor Act or otherwise.<sup>23</sup> "Congress did not

<sup>23</sup> *Brotherhood of Locomotive Engineers v. C&NW*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

intend employees have such power to block consolidations which are in the public interest.”<sup>24</sup> However, in a recent Third Circuit proceeding, *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives’ Association*,<sup>25</sup> (*Lake Erie*), it has been held that a district court has no jurisdiction to enjoin a strike taken to block an ICC-approved sale. The Court based this holding on a finding that the Norris-LaGuardia Act need not be accommodated to the Interstate Commerce Act. This decision has had an immediate impact on the formation of small railroads,<sup>26</sup> threatening to halt the revitalization of the marginal railroad sectors—a restructuring that the Commission has found to be in the interest of carriers, labor, and the shipping public.

In its opposition response, RLEA takes the position that the Third Circuit *Lake Erie* decision is correct,<sup>27</sup> and that the Commission should conclude that the Interstate Commerce Act does not supersede the Railway Labor Act or Norris-LaGuardia. RLEA argues that *Brotherhood of R.R. Trainmen v. Chicago River and Indian R.R.*<sup>28</sup> (*Chi-*

<sup>24</sup> *Missouri Pacific Railroad Company v. UTU*, 782 F.2d 107 (8th Cir. 1986), cert. denied, 107 S. Ct. 3209 (1987).

<sup>25</sup> No. 87-3664, Slip op., October 26, 1987.

<sup>26</sup> The *Lake Erie* decision has been followed by a Missouri federal district court, *Burlington Northern Railroad v. U.T.U.*, No. 86-5013, Slip op., October 26, 1987. (Missouri, Western District).

<sup>27</sup> The *Lake Erie* decision left open the issue of whether bargaining under the Railway Labor Act was necessary. The case was remanded to the district court on the RLA issue. The district court held the RLA applicable to the proposed sale and enjoined consummation of the transaction pending compliance with that act, finding that the Interstate Commerce Act does not operate to relieve the parties from their RLA obligations. *Railway Labor Executives’ Assoc. v. Pittsburgh & Lake Erie Railroad*, No. 87-1745 Memorandum Opinion (Wes. Dis. P.A., No. 24, 1987). The case is back in the Third Circuit on appeal.

<sup>28</sup> 353 U.S. 30 (1957).

*cago River*) and *Boys Markets Inc. v. Retail Clerk’s Union*<sup>29</sup> (*Boys Market*)—Supreme Court “accommodation” cases relied on by Petitioners—are not controlling since they do not address the Interstate Commerce Act, but are limited to situations where aspects of national labor statutes were in conflict.<sup>30</sup> Hence, RLEA is in agreement with the *Lake Erie* court that statutory preemption of the Norris-LaGuardia no-injunction principle is limited to the need to accommodate other labor statutes. Without conceding its legitimacy, RLEA recognizes certain precedent to the effect that ICC authorization of a transaction under the merger provisions (49 U.S.C. 11343) will automatically relieve a carrier from the necessity of compliance with the Railway Labor Act to the extent necessary to go forward with the approved transaction. However, RLEA argues that this precedent has no relevance to 49 U.S.C. 10901 line sales. Unlike line sales, merger orders are provided explicit preemption authority in 49 U.S.C. 11341<sup>31</sup> and, as income protection and dispute resolution mechanisms are mandatory in merger proceedings,<sup>32</sup> labor is not “left out in the cold.”<sup>33</sup> According to RLEA these are critical distinctions.

<sup>29</sup> 398 U.S. 235 (1970).

<sup>30</sup> Thus, in *Chicago River* an injunction against a strike was sustained where necessary to protect the Railway Labor Act’s requirement that “minor” grievances be submitted to arbitration. In *Boys Markets* the court reached a similar conclusion under the Labor Management Relations Act.

<sup>31</sup> A carrier or corporation participating in a transaction approved or exempted by the Commission under subchapter III of Chapter 113 “is exempt from the antitrust laws and from all other laws . . . as necessary to let that person carry out the transaction . . .” By its terms, this section does not apply to line sales under Chapter 109.

<sup>32</sup> 49 U.S.C. 11347.

<sup>33</sup> RLEA cites to language in *Missouri Pacific R. Co. v. United Transportation Union* 782 F.2d 109 (8th Cir. 1986). This case

The broad issue presented by the CNW-FRVR Petition and the RLEA Opposition reply is whether the Interstate Commerce Act preempts the Railway Labor Act to the extent necessary to allow the parties to consummate a transaction previously authorized by the Commission. Every court that had ruled on this precise issue prior to the *Lake Erie* decision had answered yes.<sup>34</sup> By so doing, courts have recognized the importance of this agency's role in reconciling the conflicts between public need for an efficient transportation system, (including the need for fair equitable labor relations) and the private disputes that arise invariably from consolidations and restructurings within the rail system. The ICC has inherent powers to impose labor protection where necessary to ensure labor equity,<sup>35</sup> including the power to impose income guarantees and comprehensive schemes for alternative dispute resolution—mechanisms which may include notice, negotiation, a status quo requirement and arbitration. From the 1930's, when the ICC actively became involved in the administration of labor protection, Congress has routinely affirmed and expanded the importance of the Interstate Commerce Act as a part of the

held that a railroad is exempted under ICA Section 11341(a) from the Railway Labor Act in connection with a transaction approved under 49 U.S.C. 11343. Labor emphasizes that the court there reasoned that inferring preemption of the RLA was reasonable because mandatory labor protection is applied 782 F.2d at 112. There are chronological problems with placing much reliance on the reasoning. The preemption provision was first enacted in 1920, mandatory labor protection in 1940.

<sup>34</sup> See *Missouri Pacific R. Co. v. United Transportation Union*, *supra*; *Brotherhood of Locomotive Engineers v. C&NW*, 314 F.2d 424 (8th Cir.), *cert. denied* 375 U.S. 819 (1963). Cf. *ICC v. Locomotive Engineers*, 55 USLW 4771 (June 9, 1987) (Concurring Opinion of Justice Stevens, joined by Justices Brennan, Marshall and Blackmun).

<sup>35</sup> *United States v. Lowden*, 308 U.S. 225 (1939); *ICC v. Railway Labor Assn.*, 315 U.S. 373 (1942).

complex of laws governing labor relations in the rail industry. The Transportation Act of 1940<sup>36</sup> was a legislative affirmation of the Commission's authority to impose labor protection, mandating the use of labor protection in mergers and consolidations.<sup>37</sup> The Railroad Revitalization and Regulatory Reform Act of 1976<sup>38</sup> mandated labor protection in trackage rights, lease transactions, and abandonments. The Staggers Rail Act of 1980 made labor protection mandatory in connection with the abolition of rate bureaus (Section 219 (g) and feeder line sales—section 401), as well as giving the Commission explicit discretion to impose protective conditions on reciprocal switching and on the construction of new rail lines. For more than fifty years the Commission has exercised its authority in this field, frequently at the request and with the support of labor, and our decisions have had enormous impact on the shape of rail labor relations throughout this period.

It is primarily due to the policy decision to withhold such protections taken in *Ex Parte* 392 (Sub-No. 1) (and in earlier individual proceedings) that the Commission's authority is under challenge. However, the Commission's policy determinations have been repeatedly sustained, and the existence of our jurisdiction may not hinge on the policy choice made.

In the first place, labor has not been left out in the cold. Affected parties were free to participate in the *Ex Parte* rulemaking, and are free to petition for its re-

<sup>36</sup> 54 Stat. 899.

<sup>37</sup> The *Lowden* court, while noting the pendency of the legislation which was to become the 1940 Act, concluded that the legislative initiatives did not militate against the conclusion that the Commission had implied power over labor protection in consolidations, but rather that Congress merely sought to make mandatory what was at the time discretionary. *United States v. Lowden*, *supra*, at 239.

<sup>38</sup> 90 Stat. 31.

opening. Indeed, aspects of the rulemaking are now under reconsideration in a reopened proceeding.<sup>39</sup> Further, in individual cases through the revocation process parties are given the opportunity to show that the policy norms of the Ex Parte rulemaking ought not apply. Full participation before the Commission is an important end in itself as it helps to inform the Commission of the range of problems and circumstances confronting transportation. If current policy does not provide routine protection, it is because experience has demonstrated that the formation of new lines would be thwarted, to the overall public detriment. Where exceptions are needed, the Commission has the authority to fashion a full remedy.

Jurisdiction is not determined by outcome. The Commission has exclusive and plenary jurisdiction over the sale, merger, or abandonment of rail lines.<sup>40</sup> This authority was granted by Congress as a part of a regulatory framework, to ensure a rail transportation system in the public interest. As a necessary component of this regulatory framework, the Commission has had to preempt on occasion the operation of other laws to the limited extent necessary to remove obstacles to Commission approved transactions. Such preemption of labor legislation has been upheld even in circumstances where the Commission did not provide labor protection under its auspices.<sup>41</sup> We believe this is the correct interpretation of the matter at issue.

The fact that a particular "labor outcome" does not dictate the extent or effect of ICC jurisdiction is a neces-

<sup>39</sup> *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, Notice of Proposed Rulemaking served October 2, 1987.

<sup>40</sup> *Brotherhood of Locomotive Engineers v. C&NW, supra*; *Chicago and North Western Transportation Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311 (1981).

<sup>41</sup> *RLEA v. Staten Island Railroad Corp.*, 792 F.2d 7 (2d Cir. 1986) cert. denied 107 S. Ct. 927 (1987).

sary correlative to the Commission's discharge of its responsibilities. That the concern for labor equity is only one of many conflicting aspects of National Transportation Policy should not be seen as a derogation of the agency's authority—rather it is precisely the reason why the Interstate Commerce Act must be recognized to have preeminence. It is the public policy of this Nation to regulate and supervise transportation at the national level so as to ensure the essential benefits of a critical aspect of commerce. While the means of regulation have changed markedly over the decades, the exclusive and plenary nature of the Commission's jurisdiction over consolidations, sales and abandonment has been consistently upheld. In the discharge of our responsibilities, we are charged with the expert resolution of many-sided conflicts between disputants, public and private. The recitation above of the factors leading to our small-railroad policy illustrates the complexity of the process and information that led to our present policy.

As with all adversarial proceedings those which come before the Commission generate winners and losers, but it must also be clear that participants ought to, after exhausting lawful appeals aimed at our authority and reasonableness, be reconciled to the process. Allowing a dispersion of authority will compound the problems to the detriment of the public and the transportation system. In the matter at hand, it cannot be doubted that a strike to prevent ICC-approved abandonment is susceptible to injunction. But it is now contended that such a strike can be used to prevent the development of an advantageous alternative to abandonment, despite the fact that Commission jurisdiction over these two types of restructuring is, in all relevant aspects, identical. Our expertise and experience, combined with our system-wide responsibilities, lead us to the conclusion that neither the public nor labor is adequately protected by encouraging a system that prefers abandonment to rejuvenation. We do not believe the law is so structured as to compel that outcome.

Organized as it is, FRVR stands a far better chance of developing a self-sustaining rail operation than does CNW. Over the past quarter century the miles of road operated by CNW has decreased by a third.<sup>42</sup> Its management goals include further reduction in size, either through line sales or abandonment. Whether the lines at issue here could be abandoned immediately under existing law has not been demonstrated. However, fierce trucking competition combined with CNW's comparative disadvantage in rail costs significantly increase the potential of future abandonment. Clearly, the National Transportation Policy will be advanced by permitting the sale of these lines to a willing, experienced and optimistic group of managers, who will in turn rely on experienced labor and a commitment to the local customer base in an attempt to revive and preserve competitive rail transportation for this region of Wisconsin.

This action will not significantly affect either the human environment or energy conservation.

*It is ordered:*

The Petition of CNW and FRVR for an order clarifying jurisdiction and other matters is granted.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Lamboley and Simmons. Commissioners Lamboley and Simmons dissented with separate expressions.

NORETA R. MCGEE  
Secretary

(SEAL)

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<sup>42</sup> *Moody's Transportation Manual* (1963 and 1987 issues) indicates that CNW operated over 15 thousand miles of road in 1962 (including miles operated under contract and trackage rights) but that total had declined to slightly over 10 thousands miles by 1986.

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COMMISSIONER SIMMONS, dissenting:

I would have denied the petition for clarification. I have supported the policy expressed by the majority because I believe it has contributed, to some extent, to the preservation of rail lines that otherwise would have been abandoned. However, I do not agree with the majority's use of such glowing terms to describe the efficacy of the Commission's denial of labor protection in so-called "short" line sales under 49 U.S.C. 10901. The language of the decision strongly implies that there can be virtually no valid justification for departure from this policy. Indeed, the decision to grant the petition for clarification and enter this declaratory order to enunciate a policy that has long been settled and affirmed in the courts indicates a certain lack of objectivity and fairness in the application of that policy.

We must not lose sight of our responsibility to weigh the interests of labor as a part of the public interest considerations associated with section 10901 sales. Neither this responsibility, nor the policy of which it is a part is enhanced by the gratuitous declaratory order entered here by the majority.

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## COMMISSIONER LAMBOLEY, dissenting:

While no one disputes the authority of the Commission to issue declaratory orders,<sup>1</sup> I believe to do so in this instance is an inappropriate use of process. In my view, there is insufficient evidence of controversy or uncertainty to warrant the issuance of this "clarifying" decision.

In invoking the class exemption process under Ex Parte No. 392 (Sub-No. 1) <sup>2</sup> petitioners have also requested that the agency declare that its authority under 49 U.S.C. 10901 supersedes the provisions of the Railway Labor Act (RLA) <sup>3</sup> and the Norris-LaGuardia Act.<sup>4</sup> They do so because of an alleged "climate of uncertainty" which it is claimed impedes consummation of the proposed transaction. Upon closer examination it becomes evident that the alleged controversy or uncertainty results from judicial decisions as well as petitioner's own conduct, neither of which the declaratory order requested from this agency will necessarily resolve. Indeed, this order may well exacerbate matters not only for this case but for constructive activities in this forum on such issues in the future.

Petitioners argue such action is necessary because several recent court decisions <sup>5</sup> "reflects a misapplication of

<sup>1</sup> 5 U.S.C. 554(e).

<sup>2</sup> Ex Parte No. 392 (Sub-No. 1), *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

<sup>3</sup> 45 U.S.C. 151, *et seq.*

<sup>4</sup> 29 U.S.C. 101, *et seq.*

<sup>5</sup> *Railway Labor Executives' Association v. Pittsburgh & Lake Erie R. Co.*—F.2d—(No. 87-3664, 3rd Cir. October 26, 1987) (P&LE I) and *Railway Labor Executives' Association v. Pittsburgh and Lake Erie R. Co.*, Civil Action No. 87-1745 (W. D. Pa. Nov.

the accommodation doctrine and a misunderstanding of this Commission's role in addressing labor issues pertaining to transactions within its jurisdiction." The petitioners do not agree with the outcome of judicial action in which they did not participate, although the Commission did. Without more, the petitioners simply request that the Commission here render a "proper" interpretation of applicable law by declaratory order. Petitioners offer neither substantial reason nor purpose for their request as it may relate to judicial activity.

Additionally, the petitioners claim the Commission's declaratory order is necessary because, while the CNW has met with the rail unions and informal discussions have taken place, no agreements have been reached since the unions believe (apparently contrary to petitioners) that RLA procedures apply to such discussions. The petitioners do not explain why they simply do not file a request with the Commission to fashion and impose appropriate protective conditions, with post consummation negotiation and arbitration procedures, if need be. Such request for relief would squarely address alleged controversy or uncertainty concerns relating to the process and substance of negotiation.

In sum, neither judicial action nor voluntary conduct is sufficient premise upon which to establish controversy or uncertainty as cause for declaratory relief in this case.

Further, quite apart from the lack of any legitimate, demonstrable need for declaratory relief, I fail to see that this order makes any significant contribution toward resolution of statutory "accommodation" issues. There is little doubt that the Commission does not have the requisite *jurisdiction* to interpret the applicability and scope

1987), appeal pending *sub. nom. Railway Labor Executives' Ass'n v. Lake Erie Co.*, No. 87-3797 (3rd Cir. filed Nov. 25, 1987) (P&LE II).

of statutes other than the ICA. Certainly the agency may "express its viewpoint". Such as it is. It is a position which has been expressed repeatedly in court briefs<sup>6</sup> submitted by the Commission, and is well known. This decision appears to be little more than an attempt to supplement arguments in briefs previously filed and bolster prior discussion in Ex Parte No. 392 (Sub-No. 1).<sup>7</sup> It is self-serving and offers no new instruction.

Moreover, of particular concern here, is the eagerness to justify a well known position, the effect of which places the Commission in the position of apparent bias. This is especially true here because, in addition to the extended discussion of the Ex Parte No. 392 (Sub-No. 1) and pre-emption matters, this decision addresses specific employment security and displacement issues in this transaction, and consequently, in anticipatory fashion, effectively prejudices and precludes meaningful consideration of any subsequent petition for revocation raising protective condition issues. The lack of agency constraint here has unfortunate ramifications.

Finally, after all things are considered, it is fair to say that any instability or uncertainty over employment security and displacement issues is largely a consequence of our own doing by decisions such as this, as well as those in Ex Parte No. 392 (Sub-No. 1) and its progeny. Legitimate transportation transactions under the ICA have been authorized in a manner which encourages and permits unilateral abrogation of legitimate, collective bargaining agreements and statutory requirements of the RLA, without procedural or substantive accommodation of respective interests. Mutuality and reciprocity in

<sup>6</sup> See for example the Commission's brief in *P&LE II*, also a letter to District Judge dated October 8, 1987.

<sup>7</sup> Ex Parte No. 392 (Sub-No. 1), *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

collective bargaining contemplated by the RLA and resultant market-based arrangements have been nullified by our approach. It is small wonder then that the incentives for problem solving and dispute resolution through the negotiation process have been diminished and relations have become unstable.

It has become abundantly clear in these cases that the essence of the dispute is labor relations issues, not transportation.<sup>8</sup> Assuming jurisdiction, the Commission's current fixed position prevents adjustment and resolution in this forum.

<sup>8</sup> See, also letter dated December 2, 1987 in Finance Docket No. 31163, *Winona Bridge Railroad Company Trackage Rights—Burlington Northern Railroad Company*.

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Nos. 87-1589 and 87-1888

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION and  
(in No. 87-1888) INTERSTATE COMMERCE COMMISSION,  
*Respondents.*

On Writs of Certiorari to the United States  
Court of Appeals for the Third Circuit

**BRIEF FOR THE  
NATIONAL RAILWAY LABOR CONFERENCE  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

RICHARD T. CONWAY  
(Counsel of Record)  
RALPH J. MOORE, JR.  
D. EUGENIA LANGAN  
SHEA & GARDNER  
1800 Massachusetts Ave., N.W.  
Washington, D.C. 20036  
(202) 828-2000

DAVID P. LEE  
Vice Chairman and  
General Counsel  
National Railway Labor  
Conference  
1901 L Street, N.W.  
Washington, D.C. 20036  
(202) 862-7200

*Attorneys for the National  
Railway Labor Conference*

January 18, 1989

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OCTOBER TERM, 1988

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Nos. 87-1589 and 87-1888

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THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
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**On Writs of Certiorari to the United States  
Court of Appeals for the Third Circuit**

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**BRIEF FOR THE  
NATIONAL RAILWAY LABOR CONFERENCE  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

---

This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 36.2.

**STATEMENT OF THE CASE**

Under § 10901 of the Interstate Commerce Act ("ICA"),<sup>1</sup> a noncarrier can acquire a rail line from an existing railroad only if the Interstate Commerce Commission ("ICC" or "Commission") approves "with conditions the Commission finds necessary in the public interest"—which may include employee protections. In its *Ex Parte* 392 proceeding, the ICC established an expedited class exemp-

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<sup>1</sup> The ICA was codified in 1978 as Subtitle IV of 49 U.S.C., 92 Stat. 1337. Citation herein to a current section of the Act is to that section of 49 U.S.C.

tion procedure authorizing a proposed § 10901 acquisition to be consummated seven days after notice is filed with the Commission.<sup>2</sup> Rejecting arguments by Respondent Railway Labor Executives' Association ("RLEA"), the ICC concluded that "[e]mployee protection is also inconsistent with our goals in granting this class exemption and would discourage acquisitions and operations that should be encouraged. The record supports a conclusion that the acquirer would not be able to complete the transaction if those conditions were imposed" (1 I.C.C.2d at 814); and—unlike the abandonment alternative—"in transactions under section 10901, operations are continuing and jobs for rail employees will continue to be available" (*id.* at 815).<sup>3</sup>

The ICC authorized a noncarrier to acquire all the rail lines of Petitioner ("P&LE"), effective September 26, 1987, after denying RLEA's petition for a stay since "it is in the public interest to allow the class exemption

<sup>2</sup> *Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd sub nom.* without opinion, *Illinois Commerce Com'n v. I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987). The judgment on that appeal (to which the RLEA was a party), App. A to NRLC's *amicus* brief in support of the petition in No. 87-1589, reveals that the affirmance was "for the reasons set forth in the decision of the Commission." In a subsequent *Ex Parte-392* proceeding, the ICC increased the notice period for larger transactions (requiring 14-days pre-filing notice and authorizing consummation 21 days after filing). See 53 Fed. Reg. 5981. In an accompanying unpublished opinion (served February 29, 1988), the ICC observed (p. 2) that "the exemption process has been successful beyond expectation" in facilitating establishment of "new carriers [that] preserve service, jobs, and rail investment" and that "typically provide better service, more tailored to individual shippers' needs;" and that the "ability to begin operations promptly is a key to the exemption's success."

<sup>3</sup> The ICC reserved jurisdiction to "revoke the exemption, in whole or in part, and impose labor protection" upon "an extraordinary showing of circumstances justifying" such protection in an individual case. 1 I.C.C.2d at 815.

to take effect" (Pet. in No. 87-1888 at 103a). In the meantime, unions representing P&LE employees served notices of proposals for a collective agreement under which in the event of sale P&LE would be required to provide employees lifetime wage guarantees, and treble damages (in addition to make-whole damages) for any losses incurred, and to include in any contract of sale provisions requiring the purchaser to assume P&LE's employees, collective agreements and unions; RLEA filed this action on behalf of those unions to enjoin consummation of the sale until the major-dispute provisions of the Railway Labor Act ("RLA") have been exhausted in regard to the employee protections to be provided; and on September 15, 1987, the unions struck the P&LE.

The District Court preliminarily enjoined that strike, holding that the ICA superseded any duty to bargain under the RLA and that § 4 of the Norris-LaGuardia Act ("NLGA") must be accommodated to the jurisdiction of the ICC. App. B to Pet. in No. 87-1589. The Third Circuit summarily reversed in an opinion limited to the NLGA issue (*id.*, App. A), *Railway Labor Exec. v. Pittsburgh & Lake Erie R.*, 831 F.2d 1231 (1987) ("*P&LE I*"), now before this Court in No. 87-1589. Although the Third Circuit acknowledged that the NLGA should be accommodated to other statutes "adopted as a part of a pattern of labor legislation," in its view § 10901 of the ICA is not such a statute because labor protection is only one of "fifteen policies relevant to the regulation of the railroad industry" and thus is merely "incidental" to the "regulatory scheme over rail transport . . ." Pet. at A-6 and 7-8; 831 F.2d at 1234, 1235.

Upon remand, the District Court ordered P&LE to bargain with the unions and enjoined consummation of the sale until the major-dispute procedures of the RLA are exhausted, unless the sale agreement "include[s] provisions for the maintenance of the status quo" by the purchaser. Pet. in No. 87-1888 at 85a. The Third Circuit

affirmed in *Ry. Labor Executives v. Pittsburgh & Lake Erie R.*, 845 F.2d 420 (1988) ("*P&LE II*"), now before this Court in No. 87-1888. Among other things, it held that P&LE has a duty under the RLA to bargain about the effects of the sale upon employees and thus to defer consummation of the sale pending such bargaining unless that duty has been superseded by the ICA (Pet. at 18a-26a; 845 F.2d at 428-432); that the injunction does not constitute a collateral attack upon the ICC's authorization of the sale (Pet. at 36a-43a; 845 F.2d at 437-440); and that the ICA does not supersede P&LE's duty to bargain under the RLA (Pet. at 44a-56a; 845 F.2d at 440-446) because, among other things, as held in *P&LE I*, § 10901 is not a labor law and only one of "fifteen distinct policies upon which the ICC must focus . . . directs the ICC's attention to the interests of labor"; so that "the interests of labor are, at best, only a relatively small concern of the ICC," making "it highly unlikely that Congress intended that rail labor look to the ICC as its sole source of protection" (Pet. at 47a-48a; 845 F.2d at 442). In reaching those conclusions, the court acknowledged that "imposing the RLA requirements in this situation may well have the practical effect of torpedoing the sale" (Pet. at 20a; 845 F.2d at 429). That has since occurred.

#### INTEREST OF AMICUS CURIAE

The National Railway Labor Conference ("NRLC") is an unincorporated association of almost all of the nation's class I railroads. It represents members in multi-employer collective bargaining under the RLA and in regard to other labor relations matters of concern to the railroad industry generally. The NRLC on occasion has been confronted with union proposals for a national agreement upon protections for employees affected by a transaction approved by the ICC and such proposals are included in pending notices served by the unions under § 6 of the RLA. The NRLC has maintained that such

issues should be determined by the ICC and are not mandatorily bargainable under the RLA.

As is most fully set forth in *FRVR Corporation, Etc.*, F.D. No. 31205 (served January 29, 1988), *aff'd* as clarified on other grounds, 861 F.2d 1082 (8th Cir. 1988), *Ex Parte 392* was a deliberate, thoroughly considered, policy decision to facilitate the establishment of short-line and regional railroads, through line sales to non-carriers, as a viable alternative to abandonments. See App. B to the NRLC's *amicus* brief in support of the petition in *P&LE I*, and the discussion thereof at pp. 6-9 of that brief. Until virtually brought to a halt by the decisions below in this case, that "policy had been validated by practical results. New railroad formation quickened, abandonments fell, service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved." App. B at 6a.

If a railroad is required to exhaust the major-dispute procedures of the RLA before consummating a line sale, the delay in itself may torpedo the sale (as occurred in regard to the P&LE); since it must be rare that a potential purchaser can obtain assurances of financing or otherwise is willing and able to wait out prolonged delays.<sup>4</sup> Those procedures include conferences, mediation

<sup>4</sup> Although not at issue in this case, a carrier may have at least an arguable basis for contending that the effects of line sales upon employees are governed by general provisions in existing agreements, such as those regarding furloughs, or by established practices, so as to give rise to a minor dispute for an adjustment board to decide. *E.g.*, *Chicago and North Western Transp. Co. v. RLEA*, 855 F.2d 1277 (7th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3374 (1988). If so, the sale normally may be consummated without awaiting the decision of the adjustment board. *Ibid.* The court below noted that the parties had not argued that P&LE's collective agreements either permit or prohibit the proposed sale, so as to require an interpretation of those agreements and thus give rise to a minor dispute in this case. Pet. in *P&LE II* at 16a-17a n.9; 845 F.2d at 428 n.9. In any event, an adverse arbitration ruling could give rise to claims for damages, even if the sale is not required to be

and, at the discretion of the President, investigation and recommendations by an emergency board. See *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 378 (1969). With good reason, they have been characterized by this Court as "long and drawn out," *Railway Clerks v. Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966), as "almost interminable," *Shore Line v. Transportation Union*, 396 U.S. 142, 149 (1969), and as "virtually endless," *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 55 U.S.L.W. 4576, 4580 (1987). In NRLC's experience, exhaustion of those procedures often requires two years or more. After that, as those cases also demonstrate, the union may strike the railroad primarily involved in the dispute and secondarily picket all other railroads.

As the ICC found, the decision in *P&LE I* is "threatening to halt the revitalization of the marginal railroad sectors—a restructuring that the Commission has found to be in the interests of carriers, labor, and the shipping public." *FRVR Corporation, Etc.*, App. B *supra* at 12a. Even if that decision is reversed, the *P&LE II* decision would similarly obstruct effectuation of the ICC's policy unless also reversed. Both decisions decide important questions of law and both should be reversed.

#### SUMMARY OF ARGUMENT

This case invokes "the classic judicial task of reconciling" potentially conflicting provisions in three statutes "and getting them to 'make sense' in combination . . . ." *United States v. Fausto*, 56 U.S.L.W. 4128, 4132 (1988). This can best be done by holding that any duty to bargain under the RLA and the prohibition of strike injunc-

undone. And, neither a minor-dispute ruling nor an arbitration decision upholding the carrier would in itself prevent the unions from progressing their § 6 notices through the major-dispute procedures of the RLA and from striking once those procedures are exhausted in the absence of an agreement upon the unions' demands.

tions in the NLGA must be accommodated to, and thus have been superseded by, the exclusive jurisdiction of the ICC over line sales and to condition authorized sales upon employee protections when in the public interest. This is particularly so since the RLEA could (and did) present its views to the ICC.

This Court has accommodated the NLGA to other statutes enacted as part of a pattern of labor legislation, particularly when those statutes have established administrative techniques for the peaceful resolution of labor disputes such as is done by § 10901 of the ICA. The erroneous conclusion below in *P&LE I* that § 10901 is not a labor statute because labor protection is only one of 15 policies specified in the national railroad transportation policy to guide the ICC, led to the erroneous conclusion in *P&LE II* that the ICA does not supersede any duty under the RLA to bargain about employee protections since "the interests of labor are, at best, only a relatively small concern of the ICC."

The jurisdiction of the ICC over labor protections in regard to line sales is not an aberration, as similar jurisdiction is conferred in regard to abandonments, mergers and various other railroad transactions requiring ICC authorization. This Court recognized that the predecessors of those provisions of the ICA as well as the predecessor of the RLA were part of the "extensive history of legislation regulating the relations of railroad employees and employers." *United States v. Lowden*, 308 U.S. 225, 235 (1939). And, the Court held there and elsewhere that the employee-protection jurisdiction of the ICC serves the public interest by, among other things, preventing disputes in that regard from interrupting rail transportation. Moreover, there is no basis for the asserted "small concern" with the interests of labor other than the fact that the ICC also considers other interests and policies. That weighing of conflicting interests and policies is a traditional function of admin-

istrative agencies. The fact that Congress has entrusted the ICC with that function as to line sales affords a strong reason for accommodating the RLA and the NLGA to the jurisdiction of the ICC rather than for concluding—as did the court below—that this made “it highly unlikely that Congress intended that rail labor look to the ICC as its sole source of protection.”

In the alternative, the Court also could hold that employee protections in connection with line sales are not included in the “rates of pay, rules, or working conditions” as to which the RLA mandates bargaining. In giving the ICC jurisdiction to condition such authorizations upon employee protections when in the public interest, Congress must have concluded that they are not amenable to “the belief that collective discussions backed by the parties’ economic weapons will result in decisions that are better for both management and labor and for society as a whole”—upon which “the concept of mandatory bargaining is premised.” *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981). Thus, the term “working conditions” in the RLA is narrower on its face than the “terms and conditions of employment” made mandatorily bargainable by the National Labor Relations Act (“NLRA”), and is less susceptible to an interpretation that extends beyond the physical conditions under which employees work to the terms and conditions under which employee status is conferred or withdrawn.

Hence, the conclusions by this Court that the NLRA does not restrict an employer’s right to go completely out of business or mandate bargaining over a partial-closure decision have substantially stronger support under the RLA: while the view of the National Labor Relations Board (“NLRB”) that the NLRA nonetheless mandates bargaining over the effects of such actions upon employees clearly is untenable under the RLA. A holding that effects bargaining is mandatory could give rise to

“almost interminable” delay before the sale could be consummated, and thus in itself torpedo a sale authorized by the ICC as has occurred in regard to the P&LE. Although much less, the delay normally incurred under the NLRA was an important factor in this Court’s conclusion in *First National Maintenance* that decision bargaining is not mandated, and that factor deserves much greater weight under the RLA.

### ARGUMENT

This case involves the interaction of potentially conflicting provisions in three federal statutes. It thus preeminently calls for an exercise of the “classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination . . .” *United States v. Fausto*, *supra*, 56 U.S.L.W. at 4132. The court below failed that task, and indeed erroneously felt itself constrained from undertaking it.<sup>5</sup>

It does not make sense to hold that Congress, which entrusted the ICC with exclusive jurisdiction over railroad line sales and to condition approvals of such sales

<sup>5</sup> Although “not happy” with the result in *P&LE II*, the court felt “constrained to reach it, because the Supreme Court has appropriately admonished the judiciary not to apply its own brand of ‘common sense’ in the face of a contrary statutory mandate” (Pet. at 57a; 845 F.2d at 446), citing *TVA v. Hill*, 437 U.S. 153, 193-195 (1978). But in *Hill* the losing party relied upon Appropriations Acts, and the “doctrine disfavoring repeals by implication . . . applies with even greater force when the claimed repeal rests solely on an Appropriations Act.” 437 U.S. at 190 (emphasis by the Court). Moreover, that doctrine is not applicable at all where the “repeal” pertains to a judicial interpretation of general statutory language rather than to an express statutory provision. *United States v. Fausto*, *supra*, 56 U.S.L.W. at 4132. Any duty to bargain under the RLA involves an interpretation of general statutory language. See pp. 20-29 *infra*. Yet, one reason asserted in *P&LE II* for holding that any such duty to bargain has not been superseded by the ICA was the doctrine that “repeals by implication are heavily disfavored.” Pet. at 45a; 845 F.2d at 440.

upon employee protections when in the public interest, nonetheless authorized unions to frustrate consummation of approved sales by invoking the major-dispute procedures of the RLA, and barred the courts from enjoining strikes intended to prevent the sales. That is particularly so since the unions may present their views as to appropriate employee protections to the ICC and, on appeal therefrom, to the courts, as the RLEA did in *Ex Parte 392*. See *Missouri Pacific R. Co. v. United Transp. Union*, 782 F.2d 107, 111-112 (8th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3837 (1987).

The most fundamental error below is the conclusion in *P&LE I* that § 10901 of the ICA is not a "labor statute" to which the NLGA need be accommodated. That error fatally infected the ruling in *P&LE II* that the ICA does not supersede any duty to bargain under the RLA in regard to line sales authorized by the ICC. We thus first demonstrate that the jurisdiction of the ICC over labor protections is an integral and important part of the statutory scheme under the ICA in regard to line sales and to various other railroad transactions as to which ICC approval is required—thereby permitting an administrative agency to weigh the interests of labor with other factors affecting the public interest and assuring that consummation of approved transactions cannot be prevented by labor. It then becomes obvious that the RLA and the NLGA should be accommodated to that statutory scheme, as a matter of law and of common sense. We then demonstrate that neither the decision to make a line sale nor its effects upon employees are mandatorily bargainable under the RLA.<sup>6</sup>

<sup>6</sup> The court below also erred in rejecting the contention that the injunction in *P&LE II* constituted an improper collateral attack upon the ICC's order. We noted the fundamental errors in that ruling in our *amicus* brief in support of the petition in *P&LE II* at 13-15. Since the page limit on *amicus* briefs does not permit a fuller discussion now, we respectfully refer the Court thereto. See also n.12, pp. 18-19 *infra*.

# **I. The Railway Labor Act and the Norris-LaGuardia Act Should Be Accommodated to the Exclusive Jurisdiction of the Interstate Commerce Commission Over Line Sales.**

The RLA governs collective bargaining in the railroad and airline industries. 45 U.S.C. §§ 151 *et seq.* Its "major purpose . . . was 'to provide a machinery to prevent strikes.'" *Texas & N.O. R. Co. v. Ry. Clerks*, 281 U.S. 548, 565 (1930). Among other things, it mandates bargaining in regard to proposals for a "change in agreements affecting rates of pay, rules, or working conditions" (45 U.S.C. §§ 152 First, 156). Although the RLA requires the parties to such a "major" dispute to maintain the *status quo* while the procedures of the Act are being exhausted, the unions thereafter may seek to coerce acceptance of their demands by self help including strikes. See pp. 5-6 *supra*.

Section 4 of the NLGA deprives the federal courts of jurisdiction to issue injunctive relief as to labor disputes regardless of the industry involved. 29 U.S.C. § 104. It was enacted "to remedy the growing tendency of federal courts to enjoin strikes by narrowly construing the Clayton Act's labor exemption from the Sherman Act's prohibition against conspiracies to restrain trade . . . ." *Jacksonville Bulk Terminals v. Longshoremen*, 457 U.S. 702, 708 (1982). Although this Court "has consistently given the anti-injunction provisions of the . . . Act a broad interpretation," the Court also has held those provisions to be inapplicable "where necessary to accommodate the Act to specific federal legislation or paramount congressional policy." *Ibid.*

The ICA regulates railroads, motor carriers, inland water carriers and freight forwarders. 49 U.S.C. §§ 10101 *et seq.* The ICC's jurisdiction thereunder is "exclusive and plenary," and that "is critical to the congressional scheme," as this Court stated in regard to the predecessor of § 10901. *Chicago & N.W. Tr. Co. v. Kalo Brick*

& *Tile Co.*, 450 U.S. 311, 321 (1981). That jurisdiction does not extend to the labor-management relations of the regulated carriers generally, but does include one limited aspect of railroad labor-management relations. The ICC has jurisdiction to impose labor protections deemed to be in the public interest in line sales under § 10901, and in certain other railroad transactions such as abandonments under § 10903 and mergers, consolidations and other acquisitions involving two or more existing railroads under §§ 11343-11347 of the ICA. Hence, the Court appropriately could apply the doctrine that, where "there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment," in reversing the decisions below. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancouri*, 417 U.S. 535, 550-551 (1974).

But however that may be, this Court has recognized "the need to accommodate two statutes when both were adopted as a part of a pattern of labor legislation." *Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 42 (1957). The Court there accommodated the NLGA to § 3 of the RLA (45 U.S.C. § 153), under which adjustment boards have exclusive jurisdiction to decide "minor" disputes over the interpretation or application of collective agreements, so as to permit strikes over such disputes to be enjoined. 353 U.S. at 39-42. This "accommodation" doctrine is a leading example of what the Court in *Fausto* referred to as the "classic judicial task" of reconciling separately enacted statutes relating to the same matter so that they "make sense" in combination." See p. 9 *supra*. While "congressional emphasis" in regard to the rights of labor has shifted, "this shift in emphasis was accomplished . . . without extensive revision of many of the older enactments," so that in accommodating them "consideration must be given to the total corpus of pertinent law and the poli-

cies that inspired ostensibly inconsistent provisions." *Boys Markets v. Clerks Union*, 398 U.S. 235, 250-251 (1970).<sup>7</sup>

Among other things, the NLGA is accommodated so as not to prevent effectuation of statutes in which "congressional emphasis shifted from protection of the nascent labor movement . . . to administrative techniques for the peaceful resolution of labor disputes." *Id.* at 251 (emphasis added). The ICA in § 10901 establishes administrative techniques for peacefully resolving disputes over labor protections in connection with authorized line sales. Yet, the court below in *P&LE I* concluded that § 10901 is not a "labor statute" to which the NLGA should be accommodated since labor protection is only one of "fifteen policies relevant to the regulation of the railroad industry" comprising the national rail transportation policy set forth in § 10101a of the ICA. See p. 3 *supra*.<sup>8</sup>

That ruling was instrumental to the further ruling in *P&LE II* that any duty to bargain in regard to line sales under the RLA has not been superseded by, and

<sup>7</sup> *Boys Markets* accommodated the NLGA so as to permit the federal courts to enjoin strikes over arbitrable disputes between unions and employers subject to the NLRA.

<sup>8</sup> The Third Circuit also erred in relying upon *Telegraphers v. Chicago & N.W. R. Co.*, 362 U.S. 330 (1960), as having rejected arguments "comparable to those made by *P&LE* . . ." Pet. at A-9; 831 F.2d at 1236. Some of the station closings involved in that case were approved by state regulatory agencies, but that was done pursuant to state law rather than to the ICA as the Third Circuit erroneously stated. See 362 U.S. at 332-333, 347-348, 353 n.18. *Telegraphers* did reject an "argument that the operation of unnecessary stations . . . runs counter to the congressional policy . . . to foster an efficient national railroad system," 362 U.S. at 342, but that argument had no basis in a specific statutory provision, such as § 10901, under which the ICC has jurisdiction to condition its approval of a transaction upon employee protections when in the public interest.

thus need not be accommodated to, § 10901 of the ICA. Citing its *P&LE I* ruling that § 10901 is not a labor law, and referring to the “fifteen distinct policies upon which the ICC must focus,” of which “only one directs the ICC’s attention to the interests of labor,” the court below concluded that “the interests of labor are, at best, only a relatively small concern of the ICC,” and thus thought “it highly unlikely that Congress intended that rail labor look to the ICC as its sole source of protection.” See p. 4 *supra*.<sup>9</sup>

The purpose of the accommodation doctrine is the reconciliation of statutes dealing in diverse ways with the same subject matter so that they carry out the congressional intent in a way that makes sense, regardless of the label that might be attached to a particular statute. Moreover, the ICA is a “labor statute” in any normal sense of that term to the extent that it is concerned with labor protection, whatever else it also may be. The Transportation Act of 1920 (41 Stat. 456) amended the ICA to enact the predecessor of the current § 10901 in regard to line sales and § 10903 in regard to abandonments (§§ 1(18) and (20), 41 Stat. 477-478), and of §§ 11343-11347 in regard to mergers and other multicarrier transactions (§ 5(2), 41 Stat. 481), and also enacted the predecessor of the RLA (41 Stat. 469-474). In *United States v. Lowden*, *supra*, 308 U.S.

<sup>9</sup> Moreover, the Third Circuit cited its *P&LE I* ruling for the proposition that “the ICC has no power to prevent a strike,” so that “a bargaining order under the RLA” is more consonant with the policy of both acts “to keep the rails running” by “ensur[ing] that labor will not engage in a work stoppage.” Pet. at 51a-52a; 845 F.2d at 443-444. But if *P&LE I* was wrongly decided, any strike over a line sale authorized by the ICC may be enjoined, while an RLA “bargaining order” only prevents a strike until the major-dispute procedures of the RLA have been exhausted in regard to proposed labor protections. Hence, accommodation of both the NLGA and the RLA to § 10901 of the ICA would go further than the RLA itself in carrying out its major purpose of preventing strikes.

at 235, this Court described all those aspects of the 1920 Act as part of the “now extensive history of legislation regulating the relations of railroad employees and employers.”

*Lowden* affirmed the ICC’s discretionary authority to condition approval of a railroad merger upon protection for employees when in the public interest. That authority may “promote the public interest in its statutory meaning” by, among other things, “prevent[ing] interruption of interstate commerce through labor disputes growing out of labor grievances . . . .” 308 U.S. at 238. In *ICC v. Railway Labor Assn.*, 315 U.S. 373 (1942), the Court similarly held that the ICC had discretionary authority to condition its approval of abandonments, under the predecessor of § 10901 as well as of § 10903, upon protection for employees. That authority also served the public interest as the “possible unstabilizing effects on the national railroad system” of labor disputes “are no smaller in the case of an abandonment like the one before us than in a consolidation like that involved in the *Lowden* case.” 315 U.S. at 377.<sup>10</sup>

<sup>10</sup> *Lowden* was decided just before and *Railway Labor Assn.* was decided after the Transportation Act of 1940 (54 Stat. 898) amended former § 5(2) of the ICA to mandate the imposition of employee protections as a condition upon the ICC’s approval of mergers and other covered transactions. Since that provision merely gave “legislative emphasis to a policy and a practice already recognized . . . by making the practice mandatory instead of discretionary,” it neither implied that the ICC did not have such discretionary authority as to approved mergers, etc., prior to the 1940 amendment, *Lowden*, 308 U.S. at 239, or in regard to its approval of abandonments, etc., under the predecessor to § 10901 which had not been similarly amended by the 1940 Act, *Railway Labor Assn.*, 315 U.S. at 379. Those decisions point up the error below in *P&LE I* when the court distinguished the holding in *Missouri Pacific R. Co. v. United Transp. Union*, *supra*, that the NLGA must be accommodated to the ICC’s jurisdiction under §§ 11343-11347, because § 11347 requires “the ICC to impose employee protective conditions” while “there is no such requirement”

As does § 11347, its predecessor authorized the railroads involved in a covered transaction and unions representing their employees to agree upon the protections to be imposed by the ICC as a condition of its approval. *Norfolk & Western R. Co. v. Nemitz*, 404 U.S. 37 (1971), held that such a "pre-consolidation agreement" constituted a "protective order of the Commission" (*id.* at 45) so that rights thereunder could not be "substantially abrogate[d]" by a subsequent agreement between the consolidated railroad and a union (*id.* at 44). Although the Court did not explicitly discuss the applicability of the RLA, it affirmed a decision by the Sixth Circuit which concluded, among other things, that the RLA "should not be applied" as its "application would threaten to prevent many consolidations" approved by the ICC. 436 F.2d 841, 845. That is equally true of approved line sales.

Those cases illustrate that the ICC's § 10901 jurisdiction over labor protection is not an unimportant aberration, but rather is an aspect of a jurisdiction that extends over a variety of railroad transactions for which ICC approval is required. Since 1920, that jurisdiction has been extended or modified not only in the Transportation Act of 1940, but also in the Railroad Revitalization and Regulatory Reform Act of 1976 (90 Stat. 31) and the Staggers Act of 1980 (94 Stat. 1985). We have summarized that course of statutory development in the NRLC's *amicus* brief in support of the petition in

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in regard to § 10901 line sales. Pet. at A-12 and 13 n.8; 831 F.2d at 1237 n.8. To hold that unions may strike because the ICC has been given discretion is in effect to negate the decision of Congress to give the ICC such discretion rather than to require protections. It should be noted, moreover, that where Congress mandated employee protections, it established a minimum, so that the ICC retains discretion to require more. *E.g., Railway Labor Assn. v. United States*, 339 U.S. 142 (1950).

*P&LE I*, at 13-15.<sup>11</sup> After covering much the same ground, the ICC noted that:

"Congress has routinely affirmed and expanded the importance of the [ICA] as a part of the complex of laws governing labor relations in the rail industry. . . . For more than fifty years the Commission has exercised its authority in this field, frequently at the request and with the support of labor, and our decisions have had enormous impact on the shape of rail labor relations throughout this period."

*FRVR Corporation, Etc.*, App. B *supra* at 14a-15a.

The fact that the national rail transportation policy lists fifteen policies to guide the ICC in exercising its manifold functions does not mean that each such policy is relevant to every ICC decision. *Illinois Commerce Commission v. I.C.C.*, 787 F.2d 616, 627 (D.C. Cir. 1986). But in exercising its jurisdiction over line sales, the ICC certainly is entitled to give weight to the policy "to reduce regulatory barriers to entry into and exit from the industry" (§ 10101a(7)), for example, as well

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<sup>11</sup> As also noted in that brief, at 16 n.9, the Congress has dealt with the issue of protection for labor employees in a number of statutes relating to the creation of Amtrak or to certain railroad bankruptcies, in addition to the ICA. None of those statutes and none of the other relevant provisions of the ICA contain an express equivalent of the "exempt[ion]," in 11341a, "from the antitrust laws, and from all other law, including State and municipal law, as necessary" to the carrying out of a merger or other transaction approved under §§ 11343-11347. The court below in *P&LE I* also distinguished the *Missouri Pacific* case (see n.10, p. 15, *supra*), because the ICA does not include a similar express exemption in regard to approved line sales under § 10901. However, none of the statutory provisions to which the NLGA has been accommodated by this Court contained an express exemption from the application of the NLGA. And, the express exemption in the predecessor of § 11341a from "State and municipal law" did not prevent the Court, in *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, *supra*, from holding that the ICC's jurisdiction under the predecessor to § 10901 superseded inconsistent State laws.

as to the policy "to encourage fair wages and safe and suitable working conditions in the railroad industry" (§ 10101a(12)). However, this is the most important reason in our opinion why the RLA and the NLGA should be accommodated to the ICC's jurisdiction under § 10901. As the ICC stated in *FRVR Corporation, Etc.*, App. B *supra* at 17a:

"That the concern for labor equity is only one of many conflicting aspects of National Transportation Policy should not be seen as a derogation of the agency's authority—rather it is precisely the reason why the [ICA] must be recognized to have pre-eminence. . . ." In the discharge of our responsibilities, we are charged with the expert resolution of many-sided conflicts between disputants, public and private. The recitation above of the factors leading to our [*Ex Parte 392*] policy illustrates the complexity of the process and information that led to our present policy."

A principal reason why "Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies" is that resolving the various relevant "considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission . . . ." *McLean Trucking Co. v. United States*, 321 U.S. 67, 79, 87 (1944).<sup>12</sup>

<sup>12</sup> See, generally, 321 U.S. at 79-88, and with specific reference to the national transportation policy as it then read, at 80-83. Among other things, the ICC does not have "the duty or authority to execute . . . other laws," as such, but "in executing those policies [of the ICA] the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore" them. 321 U.S. at 79-80. "The precise adjustments which [the ICC] must make," by reason

The belief below that "the interests of labor are, at best, only a relatively small concern of the ICC," has no support other than the fact that the interests of labor are not the ICC's only concern; and, as shown above, that fact makes it likely, rather than "highly unlikely" that Congress intended that rail labor look to the ICC as its sole source of protection." Certainly, the fact that the ICC ultimately concluded in *Ex Parte 392* that its authorization of line sales should not be conditioned upon employee protections, except in extraordinary circumstances, does not mean that the ICC's concern for the interests of labor was small, but only that those interests to the extent adverse to ICC's decision were overridden by other considerations relevant to the ICC's determination of the public interest.<sup>13</sup>

Moreover, the interests of labor are not necessarily congruent with the views of the RLEA, and the ICC has found that its *Ex Parte 392* policy of encouraging the formation of new short line and regional railroads has

of such other laws, "will vary from instance to instance," but consideration of such other laws "is significant chiefly as it aids in the attainment of the objectives of the national transportation policy" and the ICC "is not bound . . . to accede to the policies [in that case] of the antitrust laws" as "their dictates" can "be overborne by 'the public interest'" expressed in the national transportation policy. 321 U.S. at 80, 85-86. The fact that the RLEA and its member unions thus could urge upon the ICC the policies of the RLA for consideration in determining the extent to which authorized line sales should be conditioned upon employee protections is all the more reason for concluding, among other things, that the injunction in *P&LE II* constitutes an impermissible collateral attack upon the ICC's authorization of the sale of P&LE's lines. See n.6, p. 10 *supra*.

<sup>13</sup> For many years continuing to date, the ICC almost invariably conditioned its approvals of railroad transactions upon employee protections, regardless of whether mandatory or discretionary. The ICC's *Ex Parte 392* policy is by far the most important exception. At least from the railroads' point of view, therefore, the belief that the ICC has "only a relatively small concern" for "the interests of labor" not only is wrong, it is ludicrous.

preserved railroad jobs as well as railroad service that otherwise would be lost. See n.2, p. 2, and pp. 5-6 *supra*. The ICC fully considered the arguments of the RLEA in *Ex Parte 392* and was upheld upon appeals by the RLEA and others. Hence, it must be accepted for purposes of this case that the ICC gave the interests of labor all the concern that Congress intended.

We submit, therefore, that both the RLA and the NLGA should be accommodated to the administrative procedures provided in § 10901 of the ICA for resolving disputes over employee protections in regard to authorized line sales. The Court thereby can reconcile those statutory provisions and policies in a way that makes sense both as a matter of fact and as a matter of controlling judicial doctrines.

## II. Neither the Decision to Sell Nor the Effects of A Line Sale Upon Employees Is A Mandatorily Bargainable Issue Under the Railway Labor Act.

The argument above seems the simplest and most clearcut basis for reversing both decisions below. There is much to be said, however, for an alternative approach reconciling the RLA and the ICA by holding that the duty to bargain under the RLA does not include line sales authorized by the ICC. In that event, the NLGA should be accommodated to the administrative jurisdiction of the ICC to resolve disputes over employee protections, essentially for the reasons stated above; and in addition should be accommodated to the restriction thus placed upon mandatorily bargainable issues by the RLA.<sup>14</sup>

<sup>14</sup> Sections 8(a)(5) and (d) of the NLRA, 29 U.S.C. §§ 158(a)(5) and (d), in imposing a duty to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment," thereby also limits that duty to those subjects. *Labor Board v. Borg-Warner Corp.*, 356 U.S. 342, 348-349 (1958). Thus, it "is unlawful to insist upon" agreement respecting other matters even though it is permissible to bargain and agree about them voluntarily. *Id.* at 349. The same distinction between mandatory and

As the Court observed in regard to the duty to bargain under the NLRA, "in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business . . . ." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1981). "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business," and "also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations . . . ." *Id.* at 678-679. Hence, "in view of an employer's need for unencumbered decision-making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *Id.* at 679.

permissible subjects of bargaining is made by § 2 First of the RLA which imposes a duty to exert every reasonable effort to make and maintain agreements concerning "rates of pay, rules, and working conditions." 45 U.S.C. § 152 First. *E.g., Japan Air Lines Co. v. Intern. Ass'n of Machinists*, 538 F.2d 46, 51-52 (2d Cir. 1976). Hence, a strike over an issue that is not mandatorily bargainable "is illegal as in violation of the [RLA] and subject to injunction" despite § 4 of the NLGA. *Bangor & Aroostook R. Co. v. Brotherhood of Locomotive F. & E.*, 253 F. Supp. 682, 688 (D.D.C. 1966), *aff'd* in relevant part, 385 F.2d 581, 603-604, 613-614 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968). See, also, *Illinois Central R. Co. v. Locomotive Engineers*, 443 F.2d 136, 144 (7th Cir. 1971); *Seaboard World Airlines, Inc. v. Transport Workers Union*, 425 F.2d 1086, 1091-1092 (2d Cir. 1970), and 443 F.2d 437 (2d Cir. 1971); *Chicago & North Western Ry. v. Order of Rail. Tel.*, 264 F.2d 254, 259-260 (7th Cir. 1959), *rev'd* on other grounds, 362 U.S. 330 (1960); *Brotherhood of Rail. Train. v. New York Central R. Co.*, 246 F.2d 114, 118 (6th Cir. 1957), *cert. denied*, 355 U.S. 877 (1957); *Pullman Co. v. Railway Conductors*, 49 L.R.R.M. 3162, 3165 (N.D. Ill. 1962), *rev'd* on other grounds, 316 F.2d 556 (7th Cir. 1963), *cert. denied*, 375 U.S. 820 (1963).

That surely is even more the case under the RLA, particularly in the context of railroad transactions invoking the jurisdiction of the ICC to condition its approval upon protection for employees when in the public interest. By so providing, Congress must have concluded that those situations are not amenable to "the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole," upon which the "concept of mandatory bargaining is premised . . . ." *Id.* at 678. Perhaps the most fundamental defect in the discussion below of the bargainability issue is that the Third Circuit gave no apparent weight to the jurisdiction and authority of the ICC in those regards.<sup>15</sup> They did not disappear even if they did not supersede any duty to bargain imposed by the RLA.

<sup>15</sup> That court did not decide "whether *First National Maintenance* actually applies to railway employees" as it concluded that in any event "the railroad has a duty to bargain over the effects of the transaction prior to implementing its unilateral decision to sell its rail assets," under the RLA as construed in *Telegraphers v. Chicago & N.W. R. Co.*, *supra*, without so much as noting that *Telegraphers* did not involve a transaction over which the ICC had jurisdiction and thus could be distinguished on that ground. See *Pet. in P&LE II* at 21a-24a; 845 F.2d at 430-431. Moreover, contrary to the views below (*ibid.*), *Telegraphers* did not hold that "when a decision affects the very existence of the workers' jobs, the RLA mandates bargaining," and did not involve "in effect a [management] decision to close down certain parts of its business." The railroad did not propose to dispose of any part of its business, but only to abolish some of the many local stations at which it did business while continuing to provide the same railroad service through more centrally located stations. See 362 U.S. at 332. In holding that the union's proposal in that case "to negotiate about the job security of its members" did not "represent[] an attempt to usurp legitimate managerial prerogative in the exercise of business judgment," 362 U.S. at 336, the Court did not hold that any and all job security proposals are mandatorily bargainable under the RLA. Cf. *Fibreboard Corp. v. Labor Board*, 379 U.S. 203, 223 (1964) (Stewart, J.).

It is not accidental that the most pertinent language in the RLA describing the mandatory subjects of bargaining—"working conditions"—is narrower on its face than its counterpart in the NLRA—"terms and conditions of employment." Justice Stewart, concurring in *Fibreboard Corp. v. Labor Board*, *supra* at 221-222, observed that in "common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment," but that term is "susceptible of diverse interpretations" and had been more broadly construed by the NLRB and the courts in reviewing its decisions.<sup>16</sup> In rejecting a contention that "the term 'conditions of employment' has no broader meaning than . . . the term 'working conditions,' and that it therefore refers to the physical conditions under which employees are compelled to work rather than to the terms or conditions under which employment status is afforded or withdrawn," the NLRB noted that Senator Wagner (sponsor of the NLRA) had stated in debates on amendments thereto "that the term 'condition of employment' as used in the original Act was intended to have a broader meaning than 'working conditions' . . ." (93 Congressional Record 3427). *Inland Steel Company*, 77 N.L.R.B. 1, 7 (1948), *enforced*, 170 F.2d 247 (7th Cir. 1948), *aff'd*, 339 U.S. 382 (1950).<sup>17</sup>

<sup>16</sup> The NLRA "assigned to the Board the primary task of construing" the provisions regarding mandatory subjects of bargaining; thus, "if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495, 497 (1979). The primary task of construing the pertinent provisions of the RLA is for the courts, so they can adopt the interpretation they believe to be most justifiable even if some other interpretation is reasonably defensible.

<sup>17</sup> In enforcing that decision, the Seventh Circuit similarly noted that: "A comparison of the language of the two Acts shows that Congress in the instant legislation must have intended a bargaining

*Textile Workers v. Darlington Co.*, 380 U.S. 263, 273-274 (1965), held "that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice" under the NLRA. That decision was premised upon the view that the "proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act." *Id.* at 270. Nonetheless, the NLRB has held that an employer has a duty to bargain in regard to the effects of a total closure upon employees.<sup>18</sup> *First National Maintenance, supra*, held (reversing the NLRB) that an employer's decision partially to close its business is not mandatorily bargainable under the NLRA. 452 U.S. at 680-686. The employer had "consented to enforcement of the Board's order concerning bargaining over the effects of the closing and ha[d] reached agreement with the union on severance pay," 452 U.S. at 677-678 n.15, and the Court thus assumed that the Board correctly held that the em-

provision of broader scope than that contemplated in the [RLA] . . . . Congress in the instant legislation used the phrase, 'other conditions of employment,' instead of the phrase 'working conditions,' which it had previously used in the [RLA]. We think it is obvious that the phrase which it later used is more inclusive than that which it had formerly used." 170 F.2d at 254-255.

<sup>18</sup> In *Triplex Oil Refining Division*, 194 N.L.R.B. 500, 504 (1971), an Administrative Law Judge noted that a prior NLRB decision had held that effects bargaining is mandatory, and concluded that "the Board's determination that the exclusionary language of *Darlington* . . . does not apply" was "[i]mplicit in" that prior decision. The NLRB in subsequent cases has mandated effects bargaining in a complete closure situation, all without explaining how the "exclusionary language" in *Darlington* can be distinguished (insofar as we have discovered). *E.g.*, *P.J. Hammil Transfer Co.*, 277 N.L.R.B. 462, 463 (1985); *Eagle Express Co.*, 273 N.L.R.B. 501, 503 (1984). See *Kirkwood Fabricators v. N.L.R.B.*, — F.2d —, WestLaw slip op. at 3-5 (8th Cir., Dec. 5, 1988).

ployer had a mandatory duty to engage in such effects bargaining.

A sale of part or all of a business, as well as a closure, plainly involves "a change in the scope and direction of the enterprise," and thus "is akin to the decision whether to be in business at all, 'not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.'" *Id.* at 677, quoting the concurrence in *Fibreboard* which further described such decisions as being "at the core of entrepreneurial control." 379 U.S. at 223. Indeed, a sale of an ongoing business is a closure from the point of view of management, and from labor's point of view may provide an opportunity for employment by the purchaser that would not exist in the event of a closure. Hence, this difference provides an additional reason for holding that a line sale does not give rise to bargainable issues.<sup>19</sup> But in assessing the applicability of those cases in an RLA context, it also is necessary to heed the admonition that the NLRA "cannot be imported wholesale into the railway labor arena," so that "analogies must be drawn circumspectly with due regard to the many differences between the statutory schemes." *Railroad Trainmen v. Terminal Co.*, *supra*, 394 U.S. at 383.

The ICC's jurisdiction and the more restrictive language of the RLA in regard to mandatory subjects of bargaining, discussed above, provide strong reasons not available under the NLRA for holding that a decision to close or sell all or part of a railroad is not mandatorily

<sup>19</sup> A closure in the railroad context involves an abandonment of railroad lines. The fact that a line sale offers a better prospect of continued railroad employment (as well as providing continued railroad service) was one of the factors that persuaded the ICC to encourage line sales as an alternative to abandonments. See pp. 2, 5-6 *supra*. In *FRVR Corporation, Etc.*, *supra*, App. B at 6a n.11, a staff analysis had demonstrated "that employment on the new lines, particularly the larger regional carriers, is typically drawn from the work force of the selling carrier."

bargainable, and for refusing to import into the RLA the view of the NLRB that the effects on employees nonetheless are bargainable under the NLRA. Another important difference between the statutory schemes, which also strongly supports those conclusions, is the vastly greater delay before the transaction can be implemented (and the consequences of that delay) that normally will result under the RLA if either the decision or its effects is mandatorily bargainable.

An "important difference . . . between permitted bargaining and mandated bargaining" is that mandatory bargaining "could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose." *First National Maintenance, supra*, 452 U.S. at 683.<sup>20</sup> That important difference was an important factor supporting the Court's conclusion that a decision to close part of a business is not mandatorily bargainable under the NLRA. The weight given to that factor surely must be much greater under the RLA, in view of its provisions requiring maintenance of the *status quo* in regard to mandatory subjects of bargaining until the exhaustion of procedures described by this Court as "long and drawn out," as "almost interminable," and as "virtually endless." See pp. 5-6, *supra*.<sup>21</sup>

<sup>20</sup> The RLEA apparently utilized the delay caused by the *P&LE II* injunction to attempt to negotiate a purchase of the P&LE lines by the unions, either alone or in conjunction with another carrier, rather than to bargain about employee protections. See Petitioner's Supplemental Brief (Nov. 22, 1988).

<sup>21</sup> Under the NLRA, an employer need only await an impasse in the bargaining before taking unilateral action in regard to a mandatory subject of bargaining. *Labor Board v. Katz*, 369 U.S. 736 (1962). In general, an impasse exists when "good faith negotiations have exhausted the prospects of concluding an agreement," which is a "matter of judgment" and depends upon the facts and circumstances of the particular case. *Taft Broadcasting Co.*, 163

Moreover, a violation of those *status quo* provisions may be enjoined at the behest of the injured party, while only the NLRB is authorized by the NLRA to seek injunctive relief against an unlawful refusal to bargain (29 U.S.C. § 160(j)) and the parties to the dispute may not do so. See *Bakery Drivers Union v. Wagshal*, 333 U.S. 437, 442 (1948). In the usual case, therefore, a contention that an employer violated the Act by refusing to bargain about a mandatory subject of bargaining is not decided by the NLRB until long after the alleged violation occurred. If it finds that an employer unlawfully failed to bargain about the effects of a transaction, the NLRB's standard remedy neither requires the transaction to be undone nor awards back pay to employees deprived of employment by consummation of the transaction during the period prior to the Board's order and for five days thereafter.<sup>22</sup>

N.L.R.B. 475, 478 (1967), *enforced*, 395 F.2d 622 (D.C. Cir. 1968). See Morris, *The Developing Labor Law* (2d ed. 1983), at 634-636, and the Third Supplement thereto (1988) at 279-280. Although that period thus may vary, neither "cases nor common-sense teach that an impasse may not be reached at even a single session" of bargaining. *Presto Casting Co.*, 262 N.L.R.B. 346, 353 (1982), *enforced in part*, 708 F.2d 495 (9th Cir. 1983). And, if a business emergency necessitates swift action, a sale may be consummated with little or no advance notice and bargaining, although that does not obviate the duty to bargain about the effects of the transaction thereafter. *Yorke v. N.L.R.B.*, 709 F.2d 1138, 1144 (7th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984).

<sup>22</sup> *Transmarine Navigation Corporation*, 170 N.L.R.B. 389, 390 (1968). Such employees are awarded an amount equivalent to two-weeks pay, and (if greater) the amount they would have earned during the period from five days after the date of the order until an agreement is made or an impasse reached in the effects bargaining ordered by the Board if requested by the union within five days after the date of the Board's order. See *Yorke v. N.L.R.B.*, *supra*, which held that the back-pay period should not commence until five days after the NLRB's order is enforced on appeal if the employer had a "debateable" basis for its appeal. 709 F.2d at 1144-1146. If an employer is held to have violated a duty to engage in decision

The extraordinarily powerful tool for delay created by the decision below that effects bargaining is mandatory under the RLA has torpedoed the sale which the ICC authorized, as the Third Circuit conceded might well occur. It seems to us self evident that to "allow the Union to force a company to bargain about the effects of its management decisions to the extent of forcing it to forego the proposed change in operations would be in effect to take away from it the freedom to make the decision in the first place." *International Ass'n of M. & A. W. v. Northeast Airlines, Inc.*, 473 F.2d 549, 558 (1st Cir. 1972), *cert. denied*, 409 U.S. 845 (1972).<sup>23</sup>

bargaining, back pay is awarded from the date that the employer consummated the transaction. If the employer also is found to have been "discriminatorily motivated," the employer is ordered "to restore the *status quo ante* by reestablishing the closed operation, unless [it] can show that such a remedy would be unduly burdensome." *National Family Opinion, Inc.*, 246 N.L.R.B. 521 (1979). "The assumption underlying the more-limited remedy [for an effects-bargaining violation] is that, inasmuch as the employer's operation would have closed regardless of good-faith bargaining . . . , ordering a make-whole remedy would be punitive, rather than compensatory." *Id.* at 522 n.5. This difference in remedies, and the minimal nature of the remedy for violation of a duty to engage in effects bargaining, goes far towards explaining the willingness of the NLRB and the lower courts to conclude that effects bargaining is mandated by the NLRB even if decision bargaining is not. Under the RLA, on the other hand, a determination that either is mandated may result in a *status quo* injunction preventing consummation of the transaction, such as was entered in *P&LE II*.

<sup>23</sup> The First Circuit essentially applied, as to both decision and effects bargaining under the RLA, the balancing analysis subsequently adopted by this Court in *First National Maintenance Corp.*, see 473 F.2d 556-559, which cited the First Circuit with approval, 452 U.S. at 683 n.20. The First Circuit emphasized that some of the union's demands in that case could not be effectuated without a renegotiation of the merger agreement. "Where it is clear . . . that bargaining about some effects of the decision [to merge] would be ineffectual unless the company could be required to renegotiate the merger, we believe that the duty to bargain about those effects does not arise at all." 473 F.2d at 558-559. The unions in this case

That essentially would occur in regard to railroad line sales (particularly if, as is usual, only a partial sale is involved), even if the effects bargaining could take place after the sale is consummated. The protections commonly demanded by the unions would make a sale economically infeasible. If the seller refused to agree to the unions' proposals, its remaining lines could be struck and other railroads secondarily picketed once the RLA's major-dispute procedures are exhausted. And, at best, uncertainty about an important future cost factor would make the desirability of consummating a line sale very questionable. The chilling effect of such factors upon line sales is easy to foresee.

Thus, if the Court reaches the issue, it should hold that there is no duty under the RLA to bargain about either the decision to sell or its effects upon employees.

demand that P&LE require a purchaser to assume its employees and collective agreements, which could not be done without renegotiating the sale. And, the First Circuit had "no doubt but that an employer . . . could refuse to discuss as unreasonable any labor protective terms" proposed by a union that would make effectuation of the employer's nonbargainable decision "prohibitively expensive . . . ." *Id.* at 558. That is true of the unions' other demands for job and compensation guarantees by P&LE plus treble damages for any losses incurred by the employees as a result of the sale.

**CONCLUSION**

For the reasons stated above and in the Brief for Petitioner, both decisions below should be reversed.

Respectfully submitted,

RICHARD T. CONWAY  
(Counsel of Record)

RALPH J. MOORE, JR.

D. EUGENIA LANGAN

SHEA & GARDNER

1800 Massachusetts Ave., N.W.

Washington, D.C. 20036

(202) 828-2000

DAVID P. LEE

Vice Chairman and

General Counsel

National Railway Labor

Conference

1901 L Street, N.W.

Washington, D.C. 20036

(202) 862-7200

*Attorneys for the National  
Railway Labor Conference*

January 18, 1989

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

PITTSBURGH & LAKE ERIE RAILROAD,  
v. *Petitioner,*

RAILWAY LABOR EXECUTIVES' ASSOCIATION and  
INTERSTATE COMMERCE COMMISSION,  
*Respondents.*

On Writs of Certiorari to the United States Court of Appeals  
for the Third Circuit

BRIEF FOR CHICAGO & NORTH WESTERN  
TRANSPORTATION COMPANY AND DAKOTA,  
MINNESOTA & EASTERN RAILROAD CORPORATION  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ROBERT J. CORBER  
STEPTOE & JOHNSON  
1330 Connecticut Ave., N.W.  
Washington, D.C. 20036  
(202) 429-3000  
*Attorneys for Amicus Curiae*  
*Dakota, Minnesota, &*  
*Eastern Railroad*  
*Corporation*

RALPH J. MOORE, JR.\*  
D. EUGENIA LANGAN  
SHEA & GARDNER  
1800 Massachusetts Ave., N.W.  
Washington, D.C. 20036  
(202) 828-2000

JAMES P. DALEY  
STUART F. GASSNER  
CHICAGO & NORTH WESTERN  
TRANSPORTATION COMPANY  
One North Western Center  
Chicago, Illinois 60606  
(312) 559-6100

*Attorneys for Amicus Curiae*  
*Chicago & North Western*  
*Transportation Company*

January 19, 1989

\* Counsel of Record

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

\_\_\_\_\_  
Nos. 87-1589 and 87-1888

PITTSBURGH & LAKE ERIE RAILROAD,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION and  
INTERSTATE COMMERCE COMMISSION,  
*Respondents.*

\_\_\_\_\_  
On Writs of Certiorari to the United States Court of Appeals  
for the Third Circuit

\_\_\_\_\_  
**BRIEF FOR CHICAGO & NORTH WESTERN  
TRANSPORTATION COMPANY AND DAKOTA,  
MINNESOTA & EASTERN RAILROAD CORPORATION  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

\_\_\_\_\_  
This *amicus* brief is being filed with the written con-  
sent of the parties pursuant to Supreme Court Rule 36.2.

**INTEREST OF *AMICI CURIAE***

Chicago & North Western Transportation Company  
("C&NW") and Dakota, Minnesota & Eastern Railroad  
Corporation ("DM&E") are the respondents in *Railway*

*Labor Executives' Ass'n v. Chicago & N.W. Transp. Co.*, petition for certiorari pending, No. 87-2049 (hereinafter the "C&NW/DM&E case"), which is being held by this Court pending its decision in Nos. 87-1589 and 87-1888, the two *Pittsburgh and Lake Erie Railroad* ("P&LE") cases. The C&NW/DM&E case presents issues that are presented by No. 87-1888 ("P&LE II").

The C&NW/DM&E case was the first of the pending cases in which the Railway Labor Executives' Association ("RLEA"), the respondent in the P&LE cases, and its member unions have attempted to invoke the "status quo" provisions of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, to enjoin sales of rail line under § 10901 of the Interstate Commerce Act (Subtitle IV of 49 U.S.C.) pending exhaustion of RLA major dispute procedures over the effects of the sales on the sellers' employees. The Interstate Commerce Commission has authorized consummation of such sales on an expedited basis, generally without imposing formal "labor protective conditions" to insulate employees from the effects of the sales, pursuant to a class exemption order and regulations promulgated under § 10505 of the Act. *Ex Parte No. 392 (Sub-No. 1)—Class Exemption For The Acquisition & Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986), codified at 49 C.F.R. §§ 1150.31-34, *aff'd mem. sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

The C&NW, which like other Class I rail carriers has had serious revenue adequacy problems for years,<sup>1</sup> has

<sup>1</sup> No Class I railroad has been "revenue adequate" for the past several years—none of them have generated sufficient revenues from their rail operations to cover their costs and yield a reasonable return on investment. See *Railroad Revenue Adequacy—1986 Determination*, 3 I.C.C.2d 966 (1987); *Railroad Revenue Adequacy—1985 Determination*, 3 I.C.C.2d 541 (1987); *Railroad Revenue Adequacy—1984 Determination*, 1 I.C.C.2d 615 (1986); *Railroad Revenue Adequacy—1983 Determination*, 1 I.C.C.2d 734 (1984).

been obliged to abandon more than 5000 miles of its track in the past decade alone. In *Ex Parte No. 392*, however, the ICC attempted to alleviate the need for such abandonments, with their attendant loss of railroad jobs and service, by facilitating an alternative means of disposing of marginal or unprofitable lines: sales and other transfers to newly-created short line or regional railroads that typically have lower operating costs than the larger carriers.

In *Ex Parte No. 392*, the ICC exercised its exemption authority under § 10505 of the Act to relieve sales to new entrants into the industry from detailed prior review requirements under § 10901, substituting an expedited "method \* \* \* to acquire Commission approval" under which these sales may be consummated upon seven days' notice to the Commission. 1 I.C.C.2d at 811, 820.<sup>2</sup> The ICC also declined RLEA's request that labor protective conditions be imposed on these transactions. The Commission determined that as a general matter such protection is not warranted. Sales of these lines to new carriers ordinarily preserve jobs for rail employees that would otherwise ultimately be lost in abandonments, and thus constitute the best protection available in most cases; and the cost of labor protection conditions would "discourage acquisitions and operations that should be encouraged." *Id.* at 814-15. However, the ICC recognized that in "an extraordinary case" labor protection might be warranted and consistent with the public interest in encouraging line sales, and thus the ICC reserved jurisdiction to resolve disputes over labor protection in particular cases on petitions under § 10505(d) of the ICA for revocation of the class exemption. *Id.* at 815.<sup>3</sup> RLEA

<sup>2</sup> The ICC has since extended the preconsummation notice period for certain large-scale § 10901 transactions to 35 days. 53 Fed. Reg. 5981 (Feb. 29, 1988).

<sup>3</sup> The ICC has said that it will impose labor protection under *Ex Parte No. 392* in "situations in which there was misuse of the

appealed to the United States Court of Appeals for the District of Columbia Circuit, which affirmed *per curiam* "for the reasons set forth in the decision of the Commission." *Illinois Commerce Comm'n v. ICC, supra*. RLEA did not seek certiorari.

In August 1986, C&NW and DM&E obtained ICC authority under *Ex Parte* No. 392 for the sale to DM&E of C&NW's line between Winona, Minnesota and Rapid City, South Dakota. *Dakota, M. & E. R.R.—Acquisition & Operation Exemption*, 51 Fed. Reg. 32260 (Sept. 10, 1986). That line had previously been the subject of abandonment proceedings before the ICC, and at the time of the sale was in part inoperable due to debilitation of the track. Indeed, only some 169 C&NW employees were deployed along the line—most of whom DM&E, a newly-formed carrier, offered to employ.

Nonetheless, RLEA's member unions opposed the sale when announced in July 1986, and they served notices on C&NW, ostensibly under § 6 of the RLA, demanding that C&NW agree to provide, and to require any line purchaser such as DM&E to provide, the labor protection that the ICC had declined to grant in *Ex Parte* No. 392.<sup>4</sup> RLEA

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Commission's rules or precedent, or where existing contracts specified that line sales were subject to procedural or substantive protection \* \* \* [or] where labor can demonstrate injury that was unique, disproportionate to the gains achieved for the local transport system, and which can be compensated without causing termination of the transaction or substantially undoing the benefits of the Commission's existing policy [encouraging sales of marginal line to new operations] for other communities or locales." *FRVR Corp.—Exemption Acquisition & Operation—Certain Lines of Chicago & N.W. Transp. Co.—Petition for Clarification*, I.C.C. Finance Docket No. 31205, (served Jan. 29, 1988) (Appendix, Petition for Certiorari, No. 87-1888, at 109a, 113a-114a), *aff'd as clarified on other grounds sub nom. Railway Labor Executives' Ass'n v. ICC*, 861 F.2d 1082 (8th Cir. 1988), petition for rehearing pending.

<sup>4</sup> The union notices sought so-called *New York Dock* and *Oregon Short Line III* protections, the conditions that the ICC typically

then brought suit on August 19, 1986 against C&NW and DM&E in the United States District Court for the District of Minnesota, claiming that C&NW was obliged to exhaust RLA "major dispute" procedures with respect to the effect of the sales on employees, and that the Act's "status quo" requirements for major disputes prohibited consummation of the sale in the meantime.

On August 27, 1986, the district court denied RLEA's motion for a preliminary injunction against the sale, stating that the relief sought would put the court "at loggerheads" with the decision of the ICC. (Appendix to Petition for Certiorari, No. 87-2049, at 9a-10a). The sale was thereafter consummated on September 4, 1986. RLEA continued to claim that the consummation of the sale and the effects on employees violated the RLA status quo requirements and sought injunctive relief and back pay with respect to the alleged violation.

On January 7, 1987, the district court granted motions by C&NW and DM&E for summary judgment, holding that the relief sought by the unions could not be granted because it would constitute an impermissible collateral attack on the ICC's authorization of the sale: A "decision favorable to plaintiff would put this Court directly at odds with the regulatory scheme established by *Ex Parte* 392," where the ICC had indicated "that it is the final authority in determining whether to impose labor protection in the sale of lines to the new carriers. \* \* \* Because the relief that plaintiff is seeking is so at odds with the ICC order in the present case, the only recourse it has is to the Court of Appeals, which has \* \* \* exclusive authority to modify or rescind *Ex Parte* 392" under the Hobbs Administrative Orders Review Act, 28 U.S.C.

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imposes on rail mergers and abandonments, respectively. See *New York Dock Ry.—Control—Brooklyn E.D. Terminal*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979); *Oregon Short Line R.R.—Abandonment*, 360 I.C.C. 91 (1979).

§ 2342(5). (Appendix to Petition for Certiorari, No. 87-2049, at 6a-7a.)

On appeal, the Eighth Circuit affirmed on the alternative ground that "the provisions of the ICA governing labor protective agreements supersede the mandatory bargaining requirements of the RLA," without reaching the collateral attack issue. (*Id.* at 4a).

In *P&LE II*, the Third Circuit rejected both the collateral attack theory on which the district court decided the *C&NW/DM&E* case and the supersession theory on which the Eighth Circuit affirmed that case. Since RLEA's petition for certiorari in the *C&NW/DM&E* case is being held by this Court pending a decision of the *P&LE* cases, the parties here have a direct interest in the outcome of those cases, particularly *P&LE II*. We believe that the supersession issue was correctly decided by the Eighth Circuit in *C&NW/DM&E*. We anticipate, however, that that issue will be fully developed in the briefs to be filed by P&LE and by other *amici*, as it was discussed at length by the Third Circuit in *P&LE II*. But we are concerned that the collateral attack issue may receive less emphasis in other briefs than it deserves, particularly since the discussion of the issue in *P&LE II* was cursory. (Appendix, Petition for Certiorari, No. 87-1888 ["Pet. App."] at 36a-43a). Hence, we believe that we can best assist the Court in this *amicus* brief by limiting our argument to the collateral attack issue.

#### SUMMARY OF ARGUMENT

The Hobbs Administrative Orders Review Act gives the courts of appeals "exclusive jurisdiction" to "enjoin, set aside, [or] suspend (in whole or in part)" any order or decision of the ICC. 28 U.S.C. § 2342(5). The Third Circuit in *P&LE II* nonetheless held that the district court had jurisdiction to enjoin consummation of a line sale expressly determined by the ICC to be in the public

interest and thereby to give the unions an opportunity to demand labor protections that the ICC expressly found to be contrary to the public interest. Permitting such a collateral attack on an ICC order flouts the plain and unambiguous language of the Hobbs Act, and is squarely contrary to controlling precedent in this Court.

#### ARGUMENT

##### The Decision in *P&LE II* Allowed an Impermissible Collateral Attack on an ICC Decision, in Violation of the Hobbs Act

Reversal of the decision in *P&LE II* is required by the Hobbs Act, without regard to the merits of issues as to the proper accommodation of the RLA and the Interstate Commerce Act. Under the Hobbs Act, courts of appeals have "exclusive jurisdiction" to "enjoin, set aside, suspend (in whole or in part), or \* \* \* determine the validity" of any order or decision of the Interstate Commerce Commission. 28 U.S.C. § 2342(5) (emphasis added); see also 28 U.S.C. § 2321(a). In *Venner v. Michigan Cent. R.R. Co.*, 271 U.S. 127 (1926), this Court held that a predecessor provision precluded relief in a collateral proceeding that in effect would nullify such an order, because such relief is allowable only on direct review of the Commission decision. "While the amended bill does not expressly pray that the order be annulled or set aside, it does \* \* \* pray that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside." 271 U.S. at 130.

Here, under its *Ex Parte No. 392* procedures, the ICC authorized the P&LE sale effective September 26, 1987. The district court nevertheless enjoined consummation of the sale for an indefinite period extending far beyond that date to give the unions leverage to demand that P&LE accept the labor protection conditions that the

ICC had refused to impose. The Third Circuit affirmed that injunction, even though it recognized that the delay "could effectively kill the proposed transaction" and that this "could well be contrary to the strong congressional policy in favor of rehabilitating the railroad industry." (Pet. App. at 39a). In short, the court below allowed the district court to enjoin P&LE from doing what the ICC "specifically authorized \* \* \*," contrary to the square holding of *Venner* that such relief is impermissible except on direct review of an ICC order. The Third Circuit sought to distinguish *Venner* on the ground that the injunction sought in that case "truly would have blocked the approved transaction as violative of state law, as opposed to merely delaying the transaction pending the exhaustion of bargaining"; and because that case, "at bottom, was a federal preemption case \* \* \*." (Pet. App. at 38a-39a n.27). But the ICC authorized consummation of the P&LE sale without delay under the *Ex Parte No. 392* procedure that was expressly intended to allow expedited consummation, without regard to "the exhaustion of bargaining"; and the sole ground relied upon by this Court in *Venner* was the improper collateral attack upon the ICC decision, not what the case might be thought to be "at bottom."

The Third Circuit relied primarily on the fact that the ICC's authorization of the sale was permissive rather than mandatory. (Pet. App. at 37a-38a). That distinction is flatly contrary to *Venner* and is fundamentally wrong in principle. In *Venner*, this Court expressly held that the fact that "*the order is not mandatory but permissive makes no difference in this regard.*" 271 U.S. at 131 (emphasis added). This Court was clearly correct, because by enjoining what the ICC has authorized, the district court's order "enjoin[s], set[s] aside," and "suspend[s]" the ICC's order, precisely what the Hobbs Act allows only on direct review by a court of appeals. Ac-

cordingly, the Second Circuit has explicitly rejected the permissive-mandatory distinction.<sup>5</sup> Other courts of appeals have repeatedly dismissed as collateral attacks cases involving RLA claims for relief that would have interfered with consummation of transactions authorized, *but not required*, by the Interstate Commerce Commission,<sup>6</sup> and by the Civil Aeronautics Board when it had jurisdiction over airline transactions like that of the ICC over railroad transactions.<sup>7</sup>

The Third Circuit also suggested it is significant that, under § 10901, the ICC need find only that the public interest "permits" a line sale and not that the public interest requires that the transaction proceed or that a delay in consummation would harm the public interest.

<sup>5</sup> *Railway Labor Executives' Ass'n v. Staten Island R.R.*, 792 F.2d 7, 12 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987).

<sup>6</sup> *E.g.*, *United Transp. Union v. Norfolk & W. Ry.*, 822 F.2d 1114, 1120-1121 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 700 (1988); *Brotherhood of Loc. Eng. v. Boston & Maine Corp.*, 788 F.2d 794, 799-802 (1st Cir. 1986), *cert. denied*, 479 U.S. 829 (1987).

Several district courts have so held in *Ex Parte No. 392* cases: in addition to the district court's holding in the *C&NW/DM&E* case, see, *e.g.*, *Chicago & N.W. Transp. Co. v. Railway Labor Executives' Ass'n*, No. 88-C-0444 (N.D. Ill. Mar. 16, 1988), *aff'd on other grounds*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988); *United Transp. Union v. Burlington N. R.R.*, 672 F. Supp. 1579 (D. Mont. 1987), *appeal pending*, No. 87-4386 (9th Cir.).

<sup>7</sup> *E.g.*, *Carey v. O'Donnell*, 506 F.2d 107, 110 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *Kesinger v. Universal Airlines*, 474 F.2d 1127, 1131-1132 (6th Cir. 1973); *Oling v. Air Line Pilots Ass'n*, 346 F.2d 270, 275-278 (7th Cir. 1965), *cert. denied*, 382 U.S. 926 (1965).

The only court of appeals decision to the contrary of which we are aware, apart from the Third Circuit decision in *P&LE II*, is the Fifth Circuit's decision in *Railway Labor Executives' Ass'n v. City of Galveston*, 849 F.2d 145 (5th Cir. 1988), *petition for certiorari pending*, No. 88-517, which followed the Third Circuit without additional elaboration.

(Pet. App. at 37a). However, the collateral attack bar does not depend upon whether an injunctive order conflicts with the public interest as found by an administrative agency, but upon whether the defendant company would be "enjoined from doing" what the administrative agency has authorized. *Venner*, 271 U.S. at 130. In any event, in rejecting RLEA's petition to stay the P&LE line sale under the *Ex Parte No. 392* procedures, the ICC found both that the "public interest does not support a grant of a stay" and that "it is in the public interest to allow the class exemption [authorizing the sale] to take effect \* \* \*." (Pet. App. at 103a).<sup>8</sup>

Finally, RLEA has contended that the prohibition on collateral attacks should be ignored in cases like this because the ICC does not enforce the RLA as such. But that misses the point entirely. The *essence* of the collateral attack doctrine under *Venner* is that plaintiffs cannot avoid the jurisdictional constraints on review of ICC orders merely by couching their prayers for relief under another theory. Moreover, in determining the public interest, the ICC is required to take into account the interests of employees implicit in the policies of the

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<sup>8</sup> More generally, the ICC has concluded that line sales authorized under *Ex Parte No. 392* procedures are "overwhelmingly beneficial," leading to "the revitalization of the marginal railroad sectors—a restructuring \* \* \* in the interest of carriers, labor, and the shipping public." *FRVR Corp.*, *supra* (Pet. App. at 109a, 111a, 118a). The ICC, further, has expressly concluded that line sales under *Ex Parte No. 392*, however beneficial they may be, are unlikely to go forward if the seller is forced to pay costly employee protection, and that the employees' best protection lies in the preservation of jobs encouraged by such sales. *Ex Parte No. 392*, *supra*, 1 I.C.C.2d at 814-15; *FRVR Corp.*, *supra* (Pet. App. at 110a, 111a). Thus, there can hardly be any question that the unions' "efforts to enjoin the sale \* \* \* constitute, in effect, an effort to overturn an administrative determination that a delay or collapse of the sale and the imposition of labor protection would harm the public interest." *P&LE II* (Pet. App. at 37a-38a).

RLA, 49 U.S.C. § 10101a(12), and the ICC has the power, where appropriate, to "leave the resolution of [a labor protection] dispute to the Railway Labor Act machinery." *Brotherhood of Loc. Eng. v. Chicago & N.W. Ry.*, 314 F.2d 424, 432 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). Its determinations in that regard are subject to direct review under the Hobbs Act.<sup>9</sup>

What this Court said with respect to the overlap of the Interstate Commerce Act and the Sherman Act in *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944), is instructive here:

"\* \* \* Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus, here, the Commission has no power to enforce the Sherman Act as such \* \* \*. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.

"But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in

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<sup>9</sup> That review is meaningful, as the Ninth Circuit has demonstrated in remanding § 10901 line sale cases to the ICC for further consideration of the labor protection issue on two recent occasions. *Railway Labor Executives' Ass'n. v. United States*, 811 F.2d 1327, 1329-30 (9th Cir. 1987); *Railway Labor Executives' Ass'n v. ICC*, 784 F.2d 959, 973 (9th Cir. 1986).

view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned." *Id.* at 79-80.

Similarly here, it is up to the ICC to determine the precise adjustments the public interest requires in light of the policies of the RLA, and the ICC's determinations in that regard are reviewable exclusively by a court of appeals under the Hobbs Act. 28 U.S.C. § 2342(5). The district court accordingly lacked power to grant the requested relief.

In short, RLEA seeks in this collateral proceeding to block a line sale for the "long and drawn" period it takes to exhaust RLA major dispute procedures,<sup>10</sup> although the ICC has determined that expeditious consummation of the sale is in the public interest and that a stay is not. It seeks to block the sale in order to secure labor protection, although the ICC has found such protection presumptively contrary to the public interest. And it seeks authority to engage in strikes to block the transaction entirely. The requested relief is not merely a collateral attack on the ICC's determinations; it is a frontal assault. It should not be permitted.

<sup>10</sup> This Court, for good reason, has characterized RLA major dispute procedures as "long and drawn out," *Railway Clerks v. Florida E.C. R. Co.*, 384 U.S. 238, 246 (1966), as "almost interminable," *Shore Line v. Transportation Union*, 396 U.S. 142, 149 (1969), and as "virtually endless," *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 107 S. Ct. 1841, 1850 (1987).

## CONCLUSION

For the foregoing reasons, and for reasons stated in the brief of the petitioner, the decision in *P&LE II* should be reversed.

Respectfully submitted,

ROBERT J. CORBER  
STEPTOE & JOHNSON  
1330 Connecticut Ave., N.W.  
Washington, D.C. 20036  
(202) 429-3000  
*Attorneys for Amicus Curiae*  
*Dakota, Minnesota, &*  
*Eastern Railroad*  
*Corporation*

RALPH J. MOORE, JR.\*  
D. EUGENIA LANGAN  
SHEA & GARDNER  
1800 Massachusetts Ave., N.W.  
Washington, D.C. 20036  
(202) 828-2000

JAMES P. DALEY  
STUART F. GASSNER  
CHICAGO & NORTH WESTERN  
TRANSPORTATION COMPANY  
One North Western Center  
Chicago, Illinois 60606  
(312) 559-6100  
*Attorneys for Amicus Curiae*  
*Chicago & North Western*  
*Transportation Company*

January 19, 1989

\* Counsel of Record

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

PITTSBURGH & LAKE ERIE RAILROAD,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION and  
INTERSTATE COMMERCE COMMISSION,  
*Respondents.*

On Writs of Certiorari to the  
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for the Third Circuit

BRIEF FOR  
GUILFORD TRANSPORTATION INDUSTRIES, INC.,  
BOSTON AND MAINE CORPORATION,  
MAINE CENTRAL RAILROAD COMPANY AND  
SPRINGFIELD TERMINAL RAILWAY COMPANY  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RALPH J. MOORE, JR.  
(Counsel of Record)  
D. EUGENIA LANGAN  
SHEA & GARDNER  
1800 Massachusetts Ave., N.W.  
Washington, D.C. 20036  
(202) 828-2000

CHARLES S. EINSIEDLER, JR.  
PIERCE, ATWOOD, SCRIBNER,  
ALLEN, SMITH & LANCASTER  
One Monument Square  
Portland, Maine 04101  
(207) 773-6411

January 19, 1989

*Attorneys for Amici Curiae*

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AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 36.2.

**INTEREST OF *AMICI CURIAE***

Guilford Transportation Industries, Inc., a non-carrier holding company, and its rail carrier subsidiaries the Boston & Maine Corporation, Maine Central Railroad Company and Springfield Terminal Railway Company

(hereinafter collectively referred to as "Guilford") are respondents in *Railway Labor Executives' Ass'n v. Guilford Transportation Industries, Inc.*, petition for certiorari pending, No. 87-1911. *Guilford* involves an attempt by the Railway Labor Executives' Association ("RLEA") to obtain a Railway Labor Act ("RLA") "status quo" injunction preventing implementation of rail line leases among the Guilford railroads authorized by the Interstate Commerce Commission ("ICC") until the railroads exhaust the "long and drawn out" RLA bargaining, or "major dispute," procedures over their right to implement the leases.<sup>1</sup> Section 11343 of the Interstate Commerce Act ("ICA") required ICC authorization of the leases, and they were approved by the ICC through an exemption under § 10505 of the ICA from the lengthy prior approval procedures ordinarily applicable under §§ 11344-11345.<sup>2</sup> Under § 10505(g), such approvals of § 11343 transactions remain subject to mandatory labor protection under § 11347 of the ICA.<sup>3</sup>

The First Circuit held that any RLA status quo and bargaining duties that the railroads might otherwise have with respect to the leases are preempted by § 11341(a) of the Act, which provides that the ICC's jurisdiction under §§ 11341-11351 "is exclusive," and that a carrier participating in a transaction subject to

<sup>1</sup> See *Railway Clerks v. Florida E.C. R. Co.*, 384 U.S. 238, 246 (1966).

<sup>2</sup> The ICA is codified as Subtitle IV of 49 U.S.C., and citations in this brief to sections of the ICA refer to the corresponding sections of 49 U.S.C.

<sup>3</sup> Leases under § 11343 are subject to the ICC's so-called *Mendocino* labor protections, as a statutory minimum. See *Mendocino Coast Ry.—Lease & Operate, California Western R.R.*, 354 I.C.C. 732 (1978), modified, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982). In *Guilford*, however, the ICC exercised discretionary jurisdiction under § 11347 to impose other labor protective conditions, in addition to *Mendocino*. See n.10 *infra*.

those provisions "is exempt from the antitrust laws and from all other law \* \* \* as necessary to let that person carry out the transaction \* \* \*." (Emphasis added). RLEA's petition for certiorari seeking review of that decision (No. 87-1911) raises essentially two questions: (1) whether § 11341(a) immunity applies to RLA obligations that might otherwise prevent a carrier from carrying out a § 11343 transaction as approved by the ICC; and (2) if so, whether that immunity is lost when the ICC employs expedited approval procedures under § 10505, even though the § 10505 procedure does not affect the ICC's "exclusive" jurisdiction over labor protection or its mandatory duty to impose such protection under § 11347.

RLEA has maintained that *Guilford* is the "best vehicle" for deciding a quite different question, presented here in No. 87-1888 ("*P&LE II*"): whether the RLA must be accommodated to the ICA in line sales subject to § 10901 of the ICA and approved under § 10505 procedures, to which neither the express immunity provision in § 11341(a) nor the provision for mandatory labor protection in § 11347 applies.<sup>4</sup> This Court evidently did not agree that *Guilford* is the best vehicle to decide that question, for it granted certiorari on the question in *P&LE II*, not in *Guilford*. The Court, however, is holding the petition for certiorari in *Guilford* in abeyance pending the decision in *P&LE II*, with which No. 87-1589 ("*P&LE I*") has been consolidated. That circumstance necessarily gives *Guilford* an interest in the outcome here. Whatever the outcome in *P&LE II*, however, there is no occasion for this Court to grant review of *Guilford*: if the Court should hold (as we believe it should) that the RLA must be accommodated to the ICA

<sup>4</sup> See Petition for A Writ of Certiorari to the United States Court of Appeals for the First Circuit, No. 87-1911, at 24-25; Supplemental Brief for Railway Labor Executives' Association, Nos. 87-1589, 87-1888, 87-1911, 87-2049 and 88-464, page 7.

in § 10901 cases, to which § 11341(a) does not apply, it would follow *a fortiori* that the judgment of the First Circuit in *Guilford* in favor of the railroads should be left standing (or affirmed); but the First Circuit's decision with respect to § 11341(a) can and should still be left standing (or affirmed) even if this Court should conclude that the RLA need not be accommodated in § 10901 transactions.<sup>5</sup>

### SUMMARY OF ARGUMENT

Guilford submits that the decision of the United States Court of Appeals for the Third Circuit in *P&LE II*, that the RLA need not be accommodated to the ICA in § 10901 transactions, should be reversed for reasons stated in the briefs of petitioner and the various *amici* in support of petitioner.<sup>6</sup> Even if this Court should affirm that holding, however, its decision on the accommodation question under § 10901 should not affect the well-settled law that the RLA is preempted by § 11341(a) in transactions subject to §§ 11343 and 11347 to the extent "necessary to let [a carrier] carry out" such a transaction as

<sup>5</sup> RLEA has pointed out that the First Circuit decision in *Guilford* followed an earlier decision of that court that relied on an alternative "collateral attack" theory under the Hobbs Administrative Orders Review Act, 28 U.S.C. § 2342(5), in holding that an RLA status quo injunction against an ICC-approved § 11343 transaction was barred, as well as on § 11341(a), *Brotherhood of Loc. Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 799-801 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986), and that the collateral attack issue is also presented in *P&LE II*. Although we believe that the Third Circuit erred in rejecting the collateral attack theory, this Court's disposition of that issue should not affect the *Guilford* case, because the judgment below is fully supported by § 11341(a) alone, and indeed, neither the district court nor the court of appeals referred to the collateral attack theory in its decision.

<sup>6</sup> We also believe that *P&LE I* was wrongly decided by the Third Circuit and should be reversed, but the Norris-LaGuardia Act accommodation question presented in that case is not involved in *Guilford*.

approved by the ICC, even where a particular transaction is approved by expedited procedures under § 10505 of the Act. As the lower courts have unanimously recognized, the plain language of both § 11341(a) and § 10505 mandate that result, and no construction of § 10901 in this case could require a different result.

### ARGUMENT

#### Whether Or Not The RLA Should Be Accommodated To The ICA In § 10901 Transactions, It Is Expressly Preempted In Transactions Governed By § 11341(a)

As the Solicitor General has demonstrated, given the ICC's comprehensive jurisdiction over "labor disputes arising out of approved transactions," the ICC "would presumably have authority to approve [transactions] that override RLA rights even in the absence of Section 11341(a)'s express exemption," such as the line sale at issue in *P&LE II*. Brief for the Interstate Commerce Commission and the United States of America, *ICC v. Brotherhood of Loc. Engineers*, Nos. 85-792 and 85-793, p. 40 n.25. No other result would appropriately reconcile the RLA and the ICA.<sup>7</sup> But, however that may be, as the Solicitor General also pointed out, § 11341(a) "clearly grants an automatic exemption from any federal, state, or local law that would otherwise prevent a party from carrying out a term of an approved [§ 11343] transaction," and thus "Section 11341(a) exempts participants"

<sup>7</sup> The Solicitor General was clearly correct. Among other things, although § 11341(a) and its predecessor, former § 5 of the ICA, do not apply to transactions governed by § 10901 and its predecessor in former § 1(18), this Court has expressly held that the ICC's jurisdiction over transactions subject to § 1(18) is "exclusive and plenary," and that such exclusivity is "critical to the congressional scheme" under the ICA. *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981). As the Court also noted, the recodification of the ICA in what is now subtitle IV of 49 U.S.C. was "without substantive change" in this regard. *Id.* at 319 n.7.

to such a transaction "from the otherwise applicable labor law" where that is necessary to ensure that the approved transaction can be implemented. *Id.* at 34-35, 34 n.21, 46 n.29.<sup>8</sup>

That is always necessary with respect to RLA major dispute procedures insofar as those procedures are contended to require bargaining over union proposals respecting the making of a § 11343 transaction or its effect on employees. Pending the exhaustion of these "purposely long and drawn out" procedures, a carrier cannot take any unilateral action not authorized by existing agreements, "based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks v. Florida E.C. R. Co.*, *supra*, 384 U.S. at 246. But the parties are "wholly free, at their own will, to agree or not to agree," and "[n]o authority is empowered to decide the dispute and no such power is intended unless the parties themselves agree to arbitration." *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 725 (1945). Upon exhaustion of the major dispute procedures unions are free to resort to self-help, including strikes and nationwide secondary picketing, to block carriers from making changes that the unions oppose. *Florida E.C. R. Co.*, *supra*, 384 U.S. at 244; *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 107 S. Ct. 1841 (1987).

These major dispute procedures cannot be applied to ICC-approved transactions without subjecting them to the threat of frustration: "Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate

<sup>8</sup> The Court decided *ICC v. Brotherhood of Loc. Engineers* on procedural grounds and thus did not reach the preemption issue. 107 S. Ct. 2360 (1987). However, a concurrence by Justice Stevens and three other Justices agreed with the Solicitor General (and the ICC, among others), that any requirements of the RLA inconsistent with a § 11343 transaction are preempted by § 11341(a). 107 S. Ct. at 2370, 2374-78.

new working rules or conditions [necessary to implement an ICC-approved transaction under the statutory predecessor to § 11343], the application of the Railway Labor Act \* \* \* would threaten to prevent many [such transactions] and, therefore, should not be applied." *Nemitz v. Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971). Accordingly, every court of appeals to have considered the question has concluded that the ICA preempts the RLA's major dispute procedures in transactions governed by § 11343 or its predecessors.<sup>9</sup> No other result is possible, given the plain language of § 11341(a), regardless of whether or not the RLA must be accommodated to the ICA in § 10901 transactions to which § 11341(a) does not apply.

Moreover, whatever this Court's view of the arguments of petitioner and other amici in this case that the ICC has exclusive jurisdiction to resolve labor disputes arising from § 10901 transactions, § 11341(a) expressly provides that the ICC's jurisdiction in that regard under § 11347 with respect to § 11343 transactions is "exclusive." That is so even where, as in *Guilford*, a § 11343 transaction is approved by means of an exemption under § 10505 from §§ 11344-11345 procedures, because § 10505(g) provides that the ICC may not use a § 10505 exemption to "relieve a carrier of its obligation to protect the inter-

<sup>9</sup> *Id.*; *United Transp. Union v. Norfolk & W. Ry.*, 822 F.2d 1114, 1122 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 700 (1988); *Missouri Pacific R.R. v. United Transp. Union*, 782 F.2d 107, 111 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987); *Brotherhood of Loc. Engineers v. Boston & Maine Corp.*, *supra*, 788 F.2d at 799-801; *Burlington Northern, Inc. v. American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); *Brotherhood of Loc. Engineers v. Chicago & N.W. Ry.*, 314 F.2d 424, 432 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963); *Texas & N.O. Ry. v. Brotherhood of R.R. Trainmen*, 307 F.2d 151, 161-62 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963).

ests of employees as required by [the ICA]." Thus where a § 11343 transaction is exempted under § 10505, the ICC must still exercise its mandatory labor protection jurisdiction under § 11347.<sup>10</sup> Under § 11341(a), that jurisdiction is "exclusive," and therefore in exempted § 11343 transactions § 11341(a) precludes the application of alternative labor dispute procedures under the RLA,<sup>11</sup> regardless of the effect of § 10505 exemptions on § 10901 transactions not subject to § 11347.

<sup>10</sup> Indeed, the ICC exercised that jurisdiction in *Guilford* to impose "extraordinary labor protective conditions" that exceed the statutory minima. (See Appendix to Petition for Certiorari, No. 87-1911, at 18a, 30a-31a).

<sup>11</sup> See *United Transp. Union v. Norfolk & W.*, *supra*, 822 F.2d at 1122 ("The requirement that the Commission impose labor protective conditions when it exempts a transaction from prior review merely substitutes one form of continuing [ICC] oversight for another," and hence § 11341(a) is applicable to exempted § 11343 transactions); accord *Brotherhood of Loc. Engineers v. Boston & Maine Corp.*, *supra*, 788 F.2d at 799-801.

## CONCLUSION

The decision below in *P&LE II* should be reversed on accommodation grounds, or on the alternative ground that the union's demands in that case are not mandatory subjects of bargaining under the RLA. Whatever the Court's disposition of *P&LE II*, however, the Court is not called upon to, and should not, disturb the well-settled law under § 11341(a), and the Court's decision in *P&LE II* should not lead it to grant the petition for a writ of certiorari in *Guilford*.

Respectfully submitted,

RALPH J. MOORE, JR.  
(Counsel of Record)  
D. EUGENIA LANGAN  
SHEA & GARDNER  
1800 Massachusetts Ave., N.W.  
Washington, D.C. 20036  
(202) 828-2000

CHARLES S. EINSIEDLER, JR.  
PIERCE, ATWOOD, SCRIBNER,  
ALLEN, SMITH & LANCASTER  
One Monument Square  
Portland, Maine 04101  
(207) 773-6411

*Attorneys for Amici Curiae*

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Nos. 87-1589 and 87-1888

Supreme Court, U.S.

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IN THE  
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OCTOBER TERM, 1988

THE PITTSBURGH & LAKE ERIE  
RAILROAD COMPANY,  
*PETITIONER,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*RESPONDENT.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE REGIONAL RAILROADS  
OF AMERICA and THE AMERICAN SHORT  
LINE RAILROAD ASSOCIATION AS AMICI  
CURIAE IN SUPPORT OF PETITIONER

Thomas C. Dorsey  
Vice President and  
General Counsel  
The American Short Line  
Railroad Association  
2000 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
(202) 785-2250

Mark M. Levin \*  
Kimberly A. Madigan  
Weiner, McCaffrey, Brodsky  
& Kaplan, P.C.  
Suite 800  
1350 New York Avenue, N.W.  
Washington, D.C. 20005  
(202) 628-2000

Attorneys for Amici Curiae  
The Regional Railroads of  
America and The American  
Short Line Railroad Association

\* Counsel of Record

Dated: January 19, 1989

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**BRIEF FOR THE REGIONAL RAILROADS  
OF AMERICA and THE AMERICAN SHORT  
LINE RAILROAD ASSOCIATION AS AMICI  
CURIAE IN SUPPORT OF PETITIONER**

---

This brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 36.2.

**INTEREST OF AMICI CURIAE**

The 1980's witnessed a dramatic growth in the number of regional and local railroads: 190 local and regional railroads were created between 1980 and 1987,<sup>1</sup> as compared with only 75 during the previous three decades.<sup>2</sup> Since the first decision in the cases at bar, however, the formation of these railroads has virtually

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<sup>1</sup> Economics and Finance Department, Association of American Railroads, Statistics of Regional and Local Railroads 60 (1988).

<sup>2</sup> Statistics of Regional and Local Railroads, *supra* n.1, at 129-290.

ceased. The Regional Railroads of America ("RRA") is comprised of 80 members, which, when taken together, own the majority of track miles and employ the majority of employees associated with the 190 companies formed since 1980.<sup>3</sup> RRA's members are predominantly companies that have been formed since 1980; however, RRA also includes several railroads formed in the 19th century which operate under the full panoply of restrictive labor agreements and working conditions that prevail throughout the Class I railroad industry.<sup>4</sup> The American Short Line Railroad Association ("ASLRA") represents 330 local railroads. Although ASLRA's members are the smallest of the railroads in the industry, having only six percent of the industry's total employees and 10 percent of its total route mileage, these railroads are by far the most numerous, constituting well over 80 percent of the total industry population. Both RRA and ASLRA are concerned that the cessation of the creation of these new businesses will jeopardize, if not destroy, the economic progress the rail industry has experienced since 1980.

Regional railroads, particularly, are an economic response to the fundamental and long-term changes in the railroad industry which were initiated by the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). That response has preserved jobs and service and has spurred investment into an industry that only ten years ago was on the verge of financial collapse. Like almost all free market initiatives, the response has worked because it makes economic sense. These new companies are showing tremendous growth potential, and that growth is resulting in numerous and more stable jobs, as well as the continued provision of rail service to communities that otherwise would have lost rail service entirely.

<sup>3</sup> The 190 carriers together own 18,327 miles of rail line and employ 6,208 employees. Statistics of Regional and Local Railroads, *supra* n.1, at 60.

<sup>4</sup> In 1987, Class I railroads were defined as those railroads which earned in excess of \$87.9 million in operating revenue per year. Statistics of Regional and Local Railroads, *supra* n.1, at Definitions.

Rail labor wants to impose on these new businesses the same unique and costly work rules and labor protective benefits it has enjoyed on the large Class I railroads. Without the constraints of the Class I labor contracts or labor protective provisions, however, regional and local railroad management and labor have been free to be creative in their approach to the problems that face the industry. For instance, through management and labor cooperation, these carriers have established pay rates for employees who operate trains on the basis of the number of hours the employees work in a day. Although this structure is not unusual in most industries, the principle of eight hours pay for eight hours work represents a significant change in the industry, as many, if not all, the large railroads pay their operating employees on the basis of the number of miles they travel in a day, *i.e.*, employees are paid a full day's wages for every 108 miles they travel.

Because regional railroads largely are a new phenomenon, and because the continued formation of new railroads is largely dependent on the outcome of these cases, RRA and ASLRA respectfully submit that an understanding of the role these companies play in the industry and its restructuring effort is relevant to the Court's decision in these cases. Thus, RRA and ASLRA respectfully submit this Brief to explain why this Court must adopt the arguments of The Pittsburgh & Lake Erie Railroad Company ("P&LE") and reverse the decisions below. Affirming the lower court would have a devastating, perhaps irreparable, impact on the industry.

### SUMMARY OF ARGUMENT

Congress in enacting the Staggers Rail Act of 1980 ("Staggers") directed the Interstate Commerce Commission ("ICC") to reduce or eliminate the regulatory burdens on the rail industry. In response to Congress's directive, the ICC has formulated its own policies with respect to line sale transactions to new carriers. Since 1986, it has been the Commission's practice to allow line sales to new carriers to proceed without extensive regulatory oversight or

the automatic imposition of labor protective conditions. The rail industry has responded favorably to these policies and, as a result, many communities and shippers have benefitted from continued, and, in most instances, improved rail transportation services.

Among its duties under the Interstate Commerce Act ("Act"), the ICC retains the power to evaluate the policy implications and public interest impact of line sale transactions and to take such actions as are consistent with established policy goals and the public's interest. During its review of a line sale transaction, the ICC is to weigh and balance the competing interests involved to reach a result which is fair and equitable to all interests concerned.

Often, after its review of these transactions, the ICC concludes that it is not in the public interest to impose upon either the selling or the acquiring companies expensive and burdensome labor protective conditions. Those decisions are based, in part, on the fact that the imposition of such conditions would impede the sale processes and would thwart the implementation of rail policy goals. It also is the ICC's belief that these sales are in labor's long-term best interest.

Without these sales, the industry and the public will experience severe consequences. Class I carriers will be forced to abandon unprofitable lines, depriving the communities and shippers they serve of rail service. These abandonments not only will disrupt the economies of the rail industry and these communities, but they also will affect rail labor as employment drops in response to the decreases in rail service. RRA and ASLRA respectfully contend that Congress recognized the public good of line sale transactions and directed the ICC to encourage actions which would lead to the revitalization of the rail industry. Affirming the appellate decisions in the cases under review would allow rail labor to impede these sales, and, thus, would directly conflict with Congress's desire and intent.

## ARGUMENT

### THROUGH THE ENACTMENT AND IMPLEMENTATION OF THE STAGGERS RAIL ACT OF 1980, CONGRESS AND THE ICC REVITALIZED THE RAIL INDUSTRY FOR THE BENEFIT OF ALL INTERESTS CONCERNED.

#### A. The Creation of Regional and Local Railroads Is Totally Consistent With the Purpose Of and Intent Behind the Staggers Rail Act of 1980.

RRA and ASLRA agree with P&LE's position that the ICC has exclusive and plenary jurisdiction to regulate the sale of rail lines and to balance and protect the various interests involved in a rail line sale. In its exercise of authority with respect to line sales, the ICC has lifted certain regulatory burdens on the rail industry to promote an efficient and viable transportation system. Through its filings, P&LE has described the effect of the ICC's actions from the perspective of a carrier seeking to sell rail lines. RRA and ASLRA respectfully submit the following to explain the perspective of companies that have acquired or that seek to acquire rail lines under the ICC's expedited acquisition procedures.

Congress, in Section 10101a of the Act, 49 U.S.C. § 10101a, set forth the policy considerations which govern the ICC's regulation of the rail industry. To achieve the goals established by Congress, the ICC's regulation of carrier actions is to be effected, *inter alia*, in a manner:

- (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
- (3) to promote a safe and efficient rail transportation system by allowing carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes to meet the needs of the public and the national defense;

• • •

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry. . . .

49 U.S.C. § 10101a(2), (3), (4), (12).

When Congress enacted these goals, it correctly perceived that the financial and physical conditions of the rail industry were in severe decline and that the industry's prospects for recovery were poor in light of the railroads' competitive disadvantage against less regulated transportation industries, such as trucks and barges. See H.R. Rep. No. 1035, 96th Cong., 2d Sess. 34-79, reprinted in 1980 U.S. Code Cong. & Ad. News 3978-4024. To revitalize the industry, Congress concluded that regulatory burdens on the industry should be reduced or eliminated. As a result, Congress directed the ICC, through the enactment of Staggers, to ease the burdens on rail carriers. See *Coal Exporters Ass'n v. United States*, 745 F.2d 76, 80-81 (D.C. Cir. 1984), cert. denied, 471 U.S. 1072 (1985).

After the enactment of Staggers, the ICC carried out Congress's instructions by handling requests for an exemption from regulatory requirements on an individual, case-by-case basis, i.e., when a company that was not yet a carrier proposed to acquire a line, that buyer would petition the ICC for an exemption from the regulatory requirements of Section 10901 of the Act, 49 U.S.C. § 10901, with respect to that acquisition only. For the most part, those petitions were routinely granted and were not conditioned upon the acceptance of labor protective conditions by either the selling or the acquiring companies. *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901*, 1 I.C.C. 2d 810, 811, 813 (1986), aff'd sub nom., *Illinois Commerce Commission v. ICC*, 817 F.2d 145 (D.C. Cir. 1987).

In 1986, the ICC recognized that its case-by-case review of these exemption requests delayed the sale processes to the detriment of the petitioning railroads without any attendant benefit to the public. *Id.* at 811. It also determined that the automatic imposition of labor protective conditions in connection with the sale of rail lines to new carriers was inconsistent with congressional and ICC policy. *Id.* at 814-15.<sup>5</sup> According to the ICC:

By 1982 the Commission had determined that the expense of labor protection foreclosed short-line development, forcing the less attractive abandonment alternative or an abandonment and sale under the provisions of 49 U.S.C. 10905. As labor protection in short-line sales to new entrants is within the Commission's discretion, the Commission began to withhold protection in individual applications on the three-part theory that (1) in doing so rail service would be preserved, (2) the new railroads provided the best prospect for protecting the employment prospects of the affected labor and (3) it made no sense to force railroads to go through the more cumbersome process of abandonment under 49 U.S.C. 10903 and sale under 49 U.S.C. 10905 to achieve the same result. After consideration of scores of individual applications, the Commission decided in a 1986 notice and comment rulemaking that the development of new small railroads was overwhelmingly beneficial and should be en-

<sup>5</sup> Under the terms of the labor protective conditions the ICC imposes in sale transactions between two carriers, employees adversely affected by such sales would be eligible for, among other things: a guarantee of their compensation for up to six years; relocation allowances and reimbursement for the loss associated with the sale of their homes or the termination of their residential leases; and retraining benefits. Furthermore, the purchasing railroad could be required to preserve the selling railroad's employees' contracts until those contracts are modified by agreement or by applicable statute. *New York Dock Ry. -- Control -- Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90, aff'd sub nom., *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). No other industry, to RRA's and ASLRA's knowledge, is statutorily compelled to provide such benefits to its employees without government assistance.

couraged and allowed to proceed with a minimum of regulatory cost and delay.

*FRVR Corporation -- Exemption Acquisition and Operation -- Certain Lines of Chicago and North Western Transportation Co.*, Finance Docket No. 31205, served January 29, 1988 ("FRVR") at 2 (footnotes omitted). Due to the policy it adopted in 1986, the Commission found that "[n]ew railroad formation quickened, abandonments fell, service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved." *Id.* at 2-3 (footnote omitted). The ICC's findings concerning the impact of its policy on the rail industry are consistent with information collected by RRA and ASLRA.

Prior to 1980, rail carriers that wished to exit from a marginal or unprofitable market did so by abandoning service over their lines in that market. *Id.* at 1. Once a line became a candidate for abandonment, the course generally followed by the railroads was to reduce the frequency of trains and to reduce maintenance expenses over the line, actions which resulted in inferior service. Inferior service led the customers to search for and to utilize other modes of transportation. The end result of this process was that the carriers lost revenues, the communities lost service and the employees lost their positions and/or were relocated.

Currently, there are thousands of miles of rail line that are potential candidates for abandonment. A 1988 internal survey of Class I railroads conducted by consultants for RRA identified over 17,000 miles of Class I track that are marginal or unprofitable light density lines that, RRA and ASLRA respectfully submit, inevitably will move from sale candidates to abandonment candidates if this Court does not reverse the decisions under review. In fact, there is evidence that the trend toward abandonment (and away from sales) has already begun.

Between 1982 and 1987, the number of abandoned miles of track declined, with the lowest level being reached in Fiscal Year 1987 when 818 miles were taken out of service.<sup>6</sup> Since the is-

<sup>6</sup> Fiscal Year 1988 ICC Ann. Rep. (Draft).

suance of the first appellate decision in the cases under review, the number of miles for which carriers have sought abandonment authority has steadily increased. For Fiscal Year 1988, 1,293 miles of rail lines were abandoned, a 58 percent increase over the previous year.<sup>7</sup> Data available at the ICC for the first months of Fiscal Year 1989 show that upward trend continuing.<sup>8</sup>

Rather than witness the continuing trend of abandonments of service that had been taking place in the 1970's, Congress in 1980 acted to preserve service by deregulating the rail industry. Deregulation created the potential for many of these marginal lines to be viable, for Staggers allowed these lines to be sold to operators who were allowed to do what the rest of America's businesses are allowed to do, *i.e.*, match costs with revenues.

Recognizing the problems associated with abandonments and the potential public good of line sales, the ICC, in accordance with the directives of Congress, concluded that lines sales should proceed without burdensome regulatory oversight or ICC-imposed labor protection costs. *FRVR* at 1-2; *Northwestern Pacific Acquiring Corp. and Eureka Southern Ry. -- Exemption From 49 U.S.C. 10901 and 11301*, Finance Docket No. 30555, served January 8, 1988 ("NWP") at 3-6. These ICC actions convinced entrepreneurs that many marginal rail lines were worth purchasing, and the marketplace responded with the necessary financing. The result has been positive: the influx of 190 new carriers since 1980.

ICC flexibility in dealing with these start-up businesses is critical when one considers how a new railroad begins its operations. Normally, it starts with a relatively light density traffic base, which was the very reason the Class I railroad desired to rid itself of the asset in the first place. The new owner usually encounters costly rehabilitation requirements because, due to the light traffic density, the selling railroad had minimized capital improvements and maintenance expenditures over the line for years before the

<sup>7</sup> Fiscal Year 1988 ICC Ann. Rep. (Draft).

<sup>8</sup> This information was obtained in discussions with officials at the ICC's Office of Proceedings on preliminary data for Fiscal Year 1989.

sale. Furthermore, the new company must generate a substantial cash flow to service its debt, which is typically high in relation to its equity.

Despite their start-up problems, the new, locally-based railroads represent what is most admirable about America's free enterprise system. They are managed by enthusiastic entrepreneurs who are betting they can turn money-losing lines into money-making lines. They are financed by institutions that are willing to undertake a high degree of risk, and, RRA and ASLRA respectfully submit, they are frequently operated by employees who understand that productivity can lead to profitability and job security.

By preserving irreplaceable railroad facilities, these new railroads sustain service to thousands of local communities. Because local railroads can offer more efficient service and are in closer touch with their shippers than Class I carriers, service has improved. See *FRVR* at 1-3. Furthermore, these carriers benefit the national railroad system by feeding traffic from light density lines to the mainline system, instead of having the traffic diverted to motor carriers. *Id.* at 1.

To provide an up-to-date assessment of the progress of these new railroads, both in their own right and in comparison to RRA's pre-1980 members, RRA surveyed its members. A random sample of 47 percent of RRA members responded in time for this filing.

The survey illustrates the new companies' growth potential. On average, their carloads and revenues have increased by 6.7 and 9.2 percent, respectively, from their first year of operation through 1988. This contrasts to an average annual decline of carloads of 0.33 percent and an average annual revenue increase of only 0.47 for the Class I railroad industry as a whole during the period 1980-1988.<sup>9</sup> Even more striking is the comparison to the pre-1980 regional railroads that are subject to national pattern labor agree-

<sup>9</sup> Association of American Railroads, *Railroad Ten-Year Trends, 1978-1987* (1988); Association of American Railroads, *Quarterly Reports of Revenue, Expenses and Income of Class I Railroads* (1988).

ments. In contrast to the new regionals' growth, these pre-1980 regional carriers had decreases in carloads and revenues of 5.6 and 0.35 percent, respectively.

Expenditures by the new companies for maintenance of facilities and equipment have likewise increased at an average annual rate of 10.7 percent. These improvements will result in improved and more efficient service to shippers, thus increasing the new railroads' ability to compete with trucks. As a comparison, the pre-1980 regionals responding to the survey had decreased their overall maintenance expenditures by an average of 0.55 percent per year from 1980 through 1988.

The results of the survey also reflect the growth in employment opportunities on the regional railroads in the 1980's. In the sample, 85 percent of the new regionals employed as many or more people at the end of 1988 as they did on their first day of operation. On an aggregated basis, employment has increased on the new regionals by an average of 4.8 percent per year. In contrast, the workforce of the pre-1980 regionals surveyed declined by 57 percent from 1980 to 1988, while employment in the Class I railroad industry declined from 458,300 to 235,750, a decrease of 48.6 percent.<sup>10</sup>

The weighted average annual wages of the new regionals' employees for 1988 are more than \$22,348. Thus, the wages of employees on the new regionals compare favorably to the estimated average 1988 average wage level of \$21,357 for employees in all industries, as reported by the Bureau of Labor Statistics.<sup>11</sup>

Finally, almost 70 percent of the new regional railroad companies participating in the survey had or were developing a profit-sharing plan for their employees. Some 62 percent had already made one or more annual profit-sharing payments.

<sup>10</sup> Interstate Commerce Commission, *Monthly Statement, M-350, Report of Railroad Employment — Class I Line Haul Railroads* (1988).

<sup>11</sup> Bureau of Labor Statistics, U.S. Department of Labor, *Average Annual Pay by State and Industry, 1986* (September 1, 1987). These figures have been adjusted to estimate 1988 wage levels.

As the survey shows, regional and local railroads are a dynamic and growing portion of the rail industry. Stopping the formation of regional and local railroads may, over the short term, preserve some jobs, but over the long-term, the large railroads will not be able to maintain artificially high employment levels. Economic forces eventually will require a solution to the problem; delay, however, will exact a great toll for while these forces are working, tens of thousands of miles of track will be deteriorating to a point where they will have no value to the owner, to a buyer, to communities or to the employees.

**B. In Evaluating All Interests in Line Sale Transactions, the ICC Properly Has Determined that All Interests, Including Labor, Benefit if the ICC Does Not Burden New Operators With Inefficient, Expensive Labor Protective Conditions.**

The ICC, as part of its exclusive and plenary jurisdiction over the railroad industry, possesses the authority to decide whether labor protective provisions should be imposed as a condition to certain transactions it authorizes. *United States v. Lowden*, 308 U.S. 225, 238 (1939). In accordance with this authority, the ICC has formulated different types of labor protective provisions to address the issues involved in the various transactions it reviews. Under Section 10901 of the Act, 49 U.S.C. § 10901, the statutory section pursuant to which a non-carrier must apply in order to acquire a rail line, the ICC possesses the discretionary authority to impose labor protective conditions on the selling entity, the acquiring entity, or both. 49 U.S.C. § 10901(c)(1)(A)(ii); *Railway Labor Executives' Ass'n v. United States*, 811 F.2d 1327, 1329 (9th Cir. 1987); *Black v. ICC*, 762 F.2d 106, 111 (D.C. Cir. 1985). In such transactions, rail labor ordinarily requests the ICC to impose labor protective conditions of the type the industry commonly refers to as "the *New York Dock* conditions."

When the ICC reviews a sale transaction between two rail carriers under Sections 11343, *et seq.*, of the Act, 49 U.S.C. §§ 11343, *et seq.*, the ICC is obligated pursuant to Section 11347 of the Act, 49 U.S.C. § 11347, to impose labor protective conditions

in connection with its authorization of the transaction. Interpreting its Section 11347 duties, the ICC promulgated in *New York Dock Ry. -- Control -- Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd sub nom.*, *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979), a comprehensive package of protective benefits for employees affected by certain transactions effected under Section 11343 of the Act, 49 U.S.C. § 11343. These conditions provide numerous economic benefits for employees adversely affected by control, merger or purchase transactions. See n. 5, *supra*.

In addition to these benefits, the *New York Dock* conditions can have the effect of requiring the purchasing carrier to assume the terms of the seller's pre-existing labor agreements:

The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

*New York Dock Ry.*, 360 I.C.C. at 84, App. III, Art. I, § 2.

The ICC's disinclination toward imposing such onerous obligations in connection with line sales to new carriers, RRA and ASLRA respectfully submit, is due in part to its recognition that such burdens in line sale transactions are not in the public interest, and are ultimately not in labor's best interest. Discussing at length its rationale for not imposing labor protective conditions in connection with line sales to new entities, the ICC has explained:

We found that, although the imposition of labor conditions would tend to encourage fair wages and safe and suitable working conditions in the industry, it would also burden the selling carrier and frustrate the statutory mandate to foster sound economic conditions in transportation. We further found that the imposition of labor conditions might thwart the development and

continuation of a sound rail transportation system by discouraging the sale of marginal rail facilities.

\* \* \*

The benefits of this policy were clear. Shippers would receive enhanced service by a more dependent and dependable local entity, communities would retain rail service, the long-haul railroads would retain traffic and at the same time be relieved from operating these lines, and, in both the long and short run, more rail jobs would be retained and could even expand with the fortunes of the new shortline carriers.

\* \* \*

A review of the rail transportation policy of Section 10101a suggests that, on balance, more policies would be furthered by not imposing labor protection on [the seller]. Under the circumstances here, the imposition of labor protection would (1) raise barriers to entry and exit (49 U.S.C. 10101a(7)); (2) discourage the continuation of rail service (49 U.S.C. 10101a(4)); and (3) impede new carrier efforts to earn adequate revenues (49 U.S.C. 10101a(3) and (5)).

*NWP* at 3, 4, 14.

The ICC's practice of not imposing "successor" obligations on a new business entering the rail industry is consistent with a decision of the United States Court of Appeals for the Seventh Circuit, one of the few courts to address the successorship issue in the Railway Labor Act context. Rejecting labor's arguments, that court concluded that non-carriers which acquired rail lines from the former Chicago, Milwaukee, St. Paul & Pacific Railroad Company should not be successor employers. *In re Chicago, Milwaukee, St. Paul & Pacific R.*, 658 F.2d 1149, 1174 (7th Cir. 1981), *cert. denied sub nom., Railway Labor Executives' Ass'n v. Ogilvie*, 455 U.S. 1000 (1982) ("MILW"). According to the Seventh Circuit, its decision was supported by the following principles underlying the decision in *National Labor Relations Board v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972), a leading case on successorship

issues in the National Labor Relations Act framework: (1) freedom of contract under federal labor law; (2) inhibition of the free flow of capital if the new employers were to be bound to the pre-existing agreements; and (3) freedom of the successor to effect substantial alterations in the operations of the enterprise. *MILW*, 658 F.2d at 1175. The Seventh Circuit further concluded that when Congress desires to bind successors to the bargaining obligations of predecessor employers, it evidences its intent to do so in a statute (e.g., 45 U.S.C. §§ 565, 772(b), 774(a)).<sup>12</sup> *Id.* Section 10901 and its legislative history contain no evidence of such intent.

Regional and local carriers must be free to work with labor to fashion solutions on an individual business basis. Contractual terms that are acceptable for a large Class I carrier may be disastrous for a small carrier. For example, Class I railroads often are required to operate their trains with 4-5 man crews. Regional and local railroads can, and do, provide better service to their customers than the Class I carriers they replaced; yet, they are able to do so with only 2-3 man crews. If the regional and local railroads were forced to run their trains with 4-5 man crews, the cost of their operations would, in many cases, exceed their revenues.

To turn a marginal or money-losing line into a successful operation, regional and local carriers have had to improve service and search for new customers. In order to be responsive to their customers' needs, regional and local railroads have had to establish competitive service schedules and prices for their services; however, if their labor costs and work rules are dictated to them before they even begin to operate, the regional and local carriers lose their ability to respond to the market.

The fact that regional and local carriers do not generally adopt the Class I railroad labor contracts does not mean that the regional and local railroads do not work with labor to create attractive, yet affordable, compensation packages. Of the new regional railroads participating in the survey referenced at page

<sup>12</sup> These statutory sections provided specifically for the assumption of collective bargaining agreements.

10, *supra*, 88 percent of their employees were unionized and, thus, these carriers had negotiated with unions the rates of pay and work rules which governed their employees' employment relationship. Furthermore, almost 70 percent had implemented profit-sharing plans for their employees so that the employees could share in the proceeds that were generated by the productivity improvements these carriers have made.

RRA and ASLRA respectfully contend that Congress and the ICC recognized the inherent benefits in allowing new carriers to acquire and operate lines without the burdens of regulation and labor protection. Without the flexibility to determine their own fate, entrepreneurs will be dissuaded from creating regional and local rail carriers, and that result will directly, and negatively, have an impact on the fate of an industry which provides essential services to shippers and communities across the Nation.

### CONCLUSION

After eight years of watching the rail industry respond constructively to deregulation, RRA and ASLRA have witnessed a disturbing, destructive trend in the industry since the issuance of the first appellate decision in the cases under review. RRA and ASLRA fear that the recent increase in rail line abandonments represents a resurgence of the pre-Staggers solution to the problem of exiting from marginal or unprofitable markets, namely, the elimination of service. If the past is prologue, the industry and the communities and shippers it serves face significant financial problems if the trend is not reversed, for rail service and jobs will be lost permanently. Acceptance of P&LE's arguments in the cases before the Court, RRA and ASLRA respectfully submit, not

only would result in a correct decision on the merits, but it also would have a much needed positive impact on an industry which provides essential transportation services to communities across the Nation. Accordingly, RRA and ASLRA respectfully request that the Court grant P&LE's requests for relief.

Respectfully submitted,

Thomas C. Dorsey  
Vice President and  
General Counsel  
The American Short Line  
Railroad Association  
2000 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
(202) 785-2250

Mark M. Levin \*  
Kimberly A. Madigan  
Weiner, McCaffrey, Brodsky  
& Kaplan, P.C.  
Suite 800  
1350 New York  
Avenue, N.W.  
Washington, D.C. 20005  
(202) 628-2000

Attorneys for Amici Curiae  
The Regional Railroads of  
America and The American  
Short Line Railroad  
Association

\* Counsel of Record

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Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,  
*Respondent.*

On Writ of Certiorari to the United States Court of Appeals  
for the Third Circuit

BRIEF OF  
THE STATE OF SOUTH DAKOTA  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

RICHARD A. ALLEN  
Counsel of Record  
JULIE A. TIGGES  
ZUCKERT, SCOUTT &  
RASENBERGER  
888 17th Street, N.W.  
Washington, D.C. 20006-3959  
(202) 298-8660  
*Attorneys for Amicus Curiae  
The State of South Dakota*

January 19, 1989

### QUESTIONS PRESENTED

The State of South Dakota will address the following questions presented by these cases:

1. Does the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, prohibit a railroad from consummating a decision to sell its rail lines until it completes bargaining with its employees' representatives under the procedures of the Act over their demands for certain protections from the adverse effects of such sale?

2. Whether Section 4 of the Norris-La Guardia Act, 29 U.S.C. § 104, prohibits courts from enjoining strikes protesting a railroad's decision to sell its rail lines.

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On Writ of Certiorari to the United States Court of Appeals  
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BRIEF OF  
THE STATE OF SOUTH DAKOTA  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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**INTEREST OF THE STATE OF SOUTH DAKOTA**

South Dakota has a vital interest in the issues presented in this case. South Dakota has taken an active role, perhaps more than any other state, in preserving rail service, and it believes the issues in this case are of critical importance to the future of our national rail system. Moreover, the resolution of those issues in this case will directly affect the outcome of a similar transaction involving the sale of a major rail line in South Dakota. As in this case, the Railway Labor Executives' Association (RLEA) brought suit to enjoin the sale of that South Dakota line. Because South Dakota believed that the claims of rail labor, if sustained, would have prevented

that sale and led to the eventual abandonment of the line, it filed briefs as amicus curiae in support of the railroad parties in the district court, the court of appeals and in this Court. See *RLEA v. Chicago & North Western Transp. Co.*, 848 F.2d 102 (8th Cir. 1988), *petition for cert. filed*, No. 87-2049. This Court is holding the petition for certiorari in No. 87-2049 pending its consideration of the same issues in this case.

Adequate rail transportation is vital to South Dakota. South Dakota is one of the nation's leading agricultural producing states, and the transportation of those products, principally corn and wheat, to eastern and western markets is and must be principally by rail. South Dakota's rail lines are also extremely important for the movement of coal across the country. In addition, South Dakota's cement and wood products industries, located in the western part of the State, depend on rail transportation to reach many of their markets.

Major bankruptcies and other misfortunes that have plagued the railroad industry in recent years have left South Dakota particularly vulnerable and have necessitated unprecedented efforts by the State to preserve essential services. These have included the acquisition and rehabilitation of almost 900 miles of track abandoned by the bankrupt Chicago, Milwaukee, St. Paul and Pacific Railroad, which the Burlington Northern Railroad now operates for the State under lease and operating agreements.

The other rail system in South Dakota is the one that is the subject of the petition in No. 87-2049. It is one of the two major east-west lines in the State. It was formerly owned by the Chicago and North Western Transportation Company ("C&NW"), and it runs from Rapid City eastwards through Brookings, South Dakota, to Winona, Minnesota. In 1986 C&NW agreed to sell this line, associated branch lines and related trackage rights,

totalling 966 miles, to a newly formed company, The Dakota, Minnesota & Eastern ("DM&E"), which is now headquartered in Brookings, South Dakota. The major portion of the lines and trackage rights that were sold, almost 600 miles, are in South Dakota.

This line carries a substantial portion of South Dakota's produce. For several years, however, operations over the line as a whole by C&NW were only marginally profitable and the State was greatly concerned with its long term viability. In 1984 C&NW applied to the Interstate Commerce Commission to abandon the 150 mile segment from Pierre to Rapid City. The ICC denied C&NW's application by an evenly divided vote notwithstanding a showing of losses of \$2 million annually by C&NW.

Because of the line's marginal, and on some segments negative, contribution to revenue, C&NW invested only minimally in the rehabilitation and maintenance of this line. The resulting deterioration of the track in turn led to the diversion of a substantial amount of overhead traffic to more circuitous routes through Nebraska and Iowa, which further diminished the line's revenue. Although deterioration of the line was a matter of great concern to the State, its total abandonment would, of course, have been far worse, not only for the shippers who depend on it but also for the railroad employees who work on it.

In South Dakota's judgment, the sale of the C&NW line to a locally based regional railroad like DM&E was clearly the optimal solution for shippers, employees and the public in general. Since commencing operations in 1986, the DM&E has not only maintained the endangered rail service but has taken significant steps to improve it. The first of these steps has been to commence a \$20 million track rehabilitation program which should recover much of the overhead traffic that has been lost in recent years. Furthermore, as a regional carrier based in the

State, DM&E's actions have already indicated a more permanent commitment to the needs of shippers in the State and has given them a competitive alternative that would have been lost if the line had been abandoned. Finally, and perhaps most importantly, DM&E hired 101 of the 169 former C&NW hourly employees employed on the line, and these are jobs that would have been lost altogether if the line had been abandoned.

Nevertheless, RLEA filed suit on behalf of C&NW's employees and their unions<sup>1</sup> to enjoin the sale. RLEA contended, as it has consistently in most such sales in recent years, that the sale of the line would amount to a change in the "status quo;" accordingly, it argued that under the scheme of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, the C&NW could not consummate the sale until it completed bargaining with the unions over their demands that C&NW provide them and require DM&E to provide them with the same protections that the ICC imposes on railroads as a condition of its approval of certain transactions, such as railroad mergers and abandonments.<sup>2</sup> Although the ICC had specifically determined not to impose such protections with respect to the particular transaction involved in the C&NW case—the sale

<sup>1</sup> RLEA is an association of all the unions representing railroad employees. Unlike employees in most industries, railroad employees are represented by unions on a craft-by-craft basis. Railroad employers are therefore usually required to bargain and reach agreements with numerous unions representing their employees.

<sup>2</sup> In the case of abandonments these protections are known as *Oregon Short Line III* protections, and they are set forth in *Oregon Shore Line R.R.—Abandonment*, 360 I.C.C. 91 (1979). In the case of mergers, the protections, known as *New York Dock* protections, are set forth in *New York Dock Ry.—Central—Brooklyn T.D. Terminal*, 360 I.C.C. 60, *aff'd*, 609 F.2d 83 (2d Cir. 1979). In both cases, those protections require railroads that are parties to a covered transaction to pay for up to six years the average pre-transaction monthly wages of employees who are dismissed or displaced to a lower paying job because of the transaction.

of a railroad line to a new enterprise<sup>3</sup>—RLEA argued that the unions were nevertheless entitled to bargain for such protections and that the transaction could not be consummated until such bargaining had been completed.

It was apparent to South Dakota that RLEA's position, if sustained, would have two consequences. The "short" term consequence would be that C&NW and DM&E would be legally precluded from consummating the sale until the completion of what this Court has described as the "almost interminable" bargaining process under the Railway Labor Act.<sup>4</sup> The longer term and more fundamental consequence of RLEA's position was that it would foreclose the sale as a practical matter because, as the ICC has found to be generally the case in this class of cases, the cost of the labor protection sought by the unions was almost certain to make the transaction too expensive for the buyer in light of the traffic and anticipated revenues.<sup>5</sup>

In the *C&NW* case, the district court denied RLEA's requested preliminary and permanent injunctions, holding that the relief sought by RLEA would conflict with the ICC's decision to exempt this class of transactions from ICC jurisdiction and not to impose labor protective conditions with respect to them. See Pet. No. 87-2049 App. 9a-10a. The United States Court of Appeals for the Eighth Circuit affirmed, holding that "the provisions of the [Interstate Commerce Act] governing labor protective agreements supersedes the mandatory bargaining requirements of the [Railway Labor Act]." 848 F.2d at 104. As a result, the sale was consummated, and DM&E has been operating the line since September 1986.

<sup>3</sup> *Ex Parte No. 392 (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901*, 1 I.C.C. 2d 810 (1986) (hereinafter "*Ex Parte 392*").

<sup>4</sup> *Detroit & Toledo Shore Line R.R. Co. v. Transportation Union*, 376 U.S. 142, 149 (1969).

<sup>5</sup> See *Ex parte No. 392*, 1 I.C.C. 2d at 815.

In the instant case, however, the Third Circuit reached the opposite conclusion. In the decision under review in No. 87-1888, the Third Circuit upheld an injunction against consummation of a line sale to a new enterprise. It held that the Railway Labor Act precluded the Pittsburgh & Lake Erie Railroad Company (P&LE) from selling its entire line until it completed bargaining over its unions' demands for protective conditions, and it held that the Interstate Commerce Act and the ICC's decisions pursuant to it did not supersede the pertinent provisions of the Railway Labor Act. In an earlier decision in the same case, under review in No. 87-1589, the Third Circuit held that federal courts are precluded by the Norris-La Guardia Act, 29 U.S.C. § 101 *et seq.*, from enjoining strikes protesting such sales.

If the Third Circuit's decisions are sustained and applied to the sale of the C&NW's line in South Dakota to the DM&E, the result would be likely to have a very adverse effect on rail transportation in the State. More generally, South Dakota believes that the Third Circuit has misconstrued the requirements of the Railway Labor Act as applied to this kind of line sale, and it submits that that error, if not corrected, will continue to stand as a major obstacle to efforts to preserve rail service over many lines throughout the country that could otherwise be saved.

#### SUMMARY OF ARGUMENT

1. The court of appeals erred in holding that the Railway Labor Act prohibits a railroad from consummating a sale of its lines until it completes bargaining with its unions over their demands for protections from the effects of the sale on employees.

a. The Railway Labor Act only requires collective bargaining with respect to "rates of pay, rules and working conditions." 45 U.S.C. § 152, First. This Court has held that under the similar provisions of the National Labor Relations Act an employer is not required to bar-

gain with its employees' representatives with respect to the employer's decision to terminate part of its business. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The Court held that such decisions, despite their direct effect on employees as a result of the necessary elimination of jobs, are exclusively for management to make and that subjecting these decisions to collective bargaining would unduly interfere with management's necessary functions. All of the Court's reasons and conclusions in *First National Maintenance* apply fully to a railroad's decision to sell all or part of its business and to its bargaining obligations.

b. Although the court of appeals purported to accept the proposition that a railroad's decision to sell its lines is not a mandatory subject for collective bargaining, it effectively reached the opposite result by holding that the railroad is nevertheless required to bargain about the "effects" of the sale—i.e., the concomitant elimination of jobs—and to complete such bargaining before consummating the sale. This was error. Any obligation to bargain about the "effects" of management's decision to terminate part of the business cannot reasonably be held to include an obligation to bargain about consequences that are a necessary result of such a decision because such bargaining would amount to bargaining about the decision itself. Nor should employers be required to bargain over demands that would necessarily preclude the decision as a practical matter. *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549, 558-59 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972). As the ICC has found to be generally true in line sales of this kind, the demands of P&LE's unions for protections from the adverse effects of its sale would preclude the transactions as a practical matter and therefore should not be a subject of mandatory bargaining.

c. Even if railroads had an obligation to bargain about the effects of line sales on employees, the court of

appeals erred in holding that such bargaining must occur and be completed before the sale itself takes place. This conclusion was based on a misconception of the "status quo" requirements of the Railway Labor Act, and the necessary consequence of the court's error is to give unions an effective veto over decisions that should be exclusively management's to make.

2. The court of appeals also erred in holding that Section 4 of the Norris-La Guardia Act, 29 U.S.C. § 104, prohibits courts from enjoining strikes undertaken to protest railroad line sales. Allowing such strikes is contrary to the basic scheme and purpose of the Railway Labor Act and the Norris-La Guardia Act to prevent industrial unrest by requiring bargaining over appropriate subjects. If the Court agrees that unions' demands in this case are not mandatory subjects of bargaining, then strikes in protest of the underlying sale should not be held to be arising out of a "labor dispute" to which the Norris-La Guardia Act's ban on injunctions applies. If it holds that they are subjects for mandatory bargaining, however, then such strikes would violate the Railway Labor Act's procedures for resolving major disputes, which violation may be enjoined under well established authority. See, e.g., *Chicago & N.W.R. Co. v. Transportation Union*, 402 U.S. 570, 581 (1971).

## ARGUMENT

### I. THE RAILWAY LABOR ACT DOES NOT PROHIBIT RAILROADS FROM SELLING ALL OR PARTS OF THEIR LINES UNTIL AFTER THEY COMPLETE BARGAINING WITH THEIR EMPLOYEES ABOUT THE EFFECTS OF SUCH SALES ON EMPLOYEES

In the decision under review in No. 87-1888 the Third Circuit addressed two principal issues: first, whether the Railway Labor Act precludes a railroad from consummating a decision to sell its rail lines until it finishes bargaining with its employees about their demands for

certain protections from the adverse effects of that sale; and second, if so, whether the provisions of the Interstate Commerce Act and ICC decisions thereunder that authorize the railroad to consummate the sale without providing such protections supercede and, in effect, override any requirements and restrictions that the Railway Labor Act would otherwise impose. The Third Circuit devoted substantial attention to the second question, and other courts, including the Eighth Circuit in the *C&NW* case have focused primarily upon it. South Dakota believes, however, that the first question is the more fundamental and important question. Indeed if the Court agrees with South Dakota's submission that the court below erred in holding that the Railway Labor Act prevents the P&LE from selling its lines until it completes bargaining over its unions' demands for protective conditions, there would be no reason for the Court to attempt to resolve the difficult questions concerning the effect of the Interstate Commerce Act and ICC decisions on employees' rights under the Railway Labor Act in this context.<sup>6</sup>

The Railway Labor Act really presents three separate questions that must be resolved in this case. The first is whether a railroad's decision to sell all or part of its lines is a mandatory subject of collective bargaining under the Act. On this question, in fact, there does not appear to be much dispute; the court below at least purported to agree that the decision to sell was itself not a mandatory subject of bargaining, and the RLEA does not appear to contend otherwise. The second and more important question is what *effects*, if any, on employees

<sup>6</sup> Furthermore, the ICC issues, though important, are limited in application to railroads and to particular types of transactions—sales by railroad of rail lines to noncarriers that are pursuant to 49 U.S.C. § 10901 and are subject to the ICC's class exemption under *Ex Parte 392*. The Railway Labor Act issues, in contrast, apply to both railroads and airlines and are relevant to the general class of decisions involving the sale or termination of major segments of a business.

of the decision to sell must the selling railroad bargain about. The third, and perhaps most important, question is *when* the railroad must bargain about whatever effects of its decision to sell are mandatory subjects of bargaining. We address each of those questions in turn.

**A. A Railroad's Decision To Sell All Or Part Of Its Lines Is Not A Mandatory Subject Of Bargaining Under The Railway Labor Act.**

The Railway Labor Act requires railroads to bargain with the representatives of their employees about "rates of pay, rules, and working conditions." 45 U.S.C. § 152, First. It does not, however, require them to bargain about every matter that affects the interests of employees. For example, a decision to change the rates charged to shippers or to adopt a new plan of capitalization or to elect a new chairman of the board of directors are all decisions that may affect the welfare of the enterprise, and thus of its employees, but they are clearly not, it is submitted, matters that the Railway Labor Act requires management to bargain about with its employees. See *Japan Air Lines Co. v. International Ass'n of Machinists*, 538 F.2d 46, 52-53 (2d Cir. 1976) (no duty to bargain over decision to continue subcontracting maintenance work); *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549, 556-57 (1st Cir.), cert. denied, 409 U.S. 845 (1972) (no duty to bargain over merger decision and its effects on employees).

Although there are a number of important differences between the Railway Labor Act and the National Labor Relations Act, 29 U.S.C. § 158 *et seq.*, the scope of the bargaining obligations under the two statutes are very similar; under the Railway Labor Act, bargaining is required with respect to "rates of pay, rules and working conditions," and under the National Labor Relations Act, it is required "with respect to wages, hours and other terms and conditions of employment." 29 U.S.C. §§ 158(a) (5)

and 158(d). Accordingly, South Dakota submits that this Court's decisions delineating the scope of the bargaining obligation under the National Labor Relations Act are also pertinent to that issue under the Railway Labor Act. Those decisions, moreover, clearly indicate that a railroad's decision to sell all or part of its lines is a decision exclusively for management and is not a mandatory subject of collective bargaining.

The most pertinent of this Court's decisions is *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), which held that a company's decision to terminate part of its business was not a mandatory subject of bargaining under the National Labor Relations Act. The Court observed that "in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed." 452 U.S. at 676. Although the Court recognized that a decision to terminate part of a business has a direct and immediate impact on employees because elimination of jobs is a necessary consequence, it also noted that the grounds for that decision are wholly unrelated to the employment relationship and are based solely on considerations of the "economic profitability" of the terminated business. *Id.* at 677. The Court held that "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business." *Id.* at 678-679. It further concluded that subjecting business termination decisions to the collective bargaining process would unduly interfere with management's necessary functions, stating that

[m]anagement may have great need for speed, flexibility and secrecy in meeting business opportunities and exigencies. It may face significant tax or securities consequences that hinge on confidentiality, the timing of a plant closing, or a reorganization of the

corporate structure. The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business. The employer also may have no feasible alternative to the closing, and even good-faith bargaining over it may both be futile and cause the employer additional loss. . . .

Labeling this type of decision mandatory could afford the union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose.

*Id.* at 682-683 (footnotes omitted).

All of the Court's observations and conclusions in *First National Maintenance Corp.* are fully applicable to decisions by railroads to sell or terminate all or part of their operations, and specifically to P&LE's decision in this case. Nor is there anything in the text, structure or purpose of the Railway Labor Act that would warrant a different conclusion with respect to the obligations of railroads and airlines to bargain about such basic management decisions as whether to terminate all or part of the business.<sup>7</sup> The Third Circuit itself at least purported

<sup>7</sup> In a footnote in *First National Maintenance* the Court stated that the "mandatory scope of bargaining under the Railway Labor Act . . . [is] not coextensive with the National Labor Relations Act . . . ." 452 U.S. 686-687, n. 23. The Court did not indicate how or why the bargaining obligations might be different under the two Acts, and South Dakota believes the Court's statement should not be read to suggest that the kind of business termination decisions involved in *First National Maintenance* would be a subject of mandatory bargaining under the Railway Labor Act. The statement was made in the context of rejecting the reliance of amicus AFL-CIO on *Railroad Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330 (1960), which held that a union was entitled to request to bargain over a railroad's decision to close certain stations, thereby eliminating jobs. As discussed more fully below, the railroad's decision in *Railroad Telegraphers*, however, was far more limited in scope and different in nature from the decisions of the employer in

to agree that there is no such obligation under the Railway Labor Act when it stated: "We agree, and the union apparently concedes, that the railroad has no obligation to bargain over the underlying decision itself, viz., to cease operating as a railroad and to sell its rail assets. See *First National Maintenance*, 452 U.S. at 686, 101 S.Ct. at 2584." *RLEA v. Pittsburgh & Lake Erie R.R. Co.*, 845 F.2d at 420, 431 (3d Cir. 1988).

Despite its statement, however, the Third Circuit's decision effected precisely the opposite result through its ruling concerning the railroad's obligations to bargain about the "effects" of its decision to sell, as we now discuss.

**B. A Railroad's Obligation To Bargain About The "Effects" Of A Management Decision Does Not Require Bargaining Over Demands That Would Necessarily Preclude Such A Decision.**

In *First National Maintenance* this Court held that management was not required to bargain about its decision to terminate part of its business, but it also stated that "[t]here is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the 'effects' bargaining mandated by § 8(a)(5)." 452 U.S. at 681. The Third Circuit in this case relied on that statement to hold that P&LE was required to bargain about the effects of its decision to sell its business before it could consummate that sale, and that the principal "effect" of the sale which it had to bargain about was the abolition of jobs resulting from the sale. 845 F.2d at 430-431. Thus the court below stated: "[W]hen a decision affects the very exist-

*First National Maintenance* or of P&LE in this case. *Railroad Telegraphers* does not support the conclusion that decisions like those of P&LE are subject to mandatory bargaining.

ence of the workers jobs, the RLA mandates bargaining." 485 F.2d at 430.<sup>8</sup>

This Court in *First National Maintenance* did not explain precisely what effects of a management decision would be mandatory subjects of bargaining, although it referred to bargaining over such matters as severance pay, notice and provision of information to employees. 452 U.S. at 677-678 n.15, 682. The issue, however, is critical in this case. South Dakota submits that the court of appeals erred in concluding that the effects of a decision to terminate all or part of a business that must be bargained about include the elimination of jobs that necessarily result from that decision. The necessary and inescapable consequence of any such conclusion would be simply to nullify the basic holding of *First National Maintenance* that the business termination decision itself is not subject to mandatory bargaining. That is so because the decision to eliminate a segment of a business and the decision to eliminate the jobs involved in that segment are, in fact, the *same thing*. To say, as the court below did, that the employer must bargain over "job security" and the preservation of jobs is simply another way of saying the employer must bargain about the decision to close that part of the business.

Indeed in *First National Maintenance* this Court clearly recognized that the decision to close part of a business and the decision to eliminate jobs are, in effect, the same decision, as to which bargaining is not mandatory. Thus the Court stated that "[t]he present case concerns a . . . type of management decision . . . that had a direct impact on employment, since jobs were inexorably eliminated by the termination . . . ." 452

<sup>8</sup> The court further stated: "It seems to us that, if workers can insist on *bargaining to preserve jobs* when the railroad proposes to abandon certain stations, they similarly can demand bargaining when the railroad proposes to abandon its ownership of an entire line." 845 F.2d at 430 n. 12 (emphasis supplied).

U.S. at 677. Because of the inevitable elimination of jobs, the Court found that bargaining over the termination decision would not serve the Act's purposes in fostering the exchange of information and suggestions between labor and management because "[t]he union's practical purpose in participating . . . will be largely uniform: it will seek to delay or halt the closing." 452 U.S. at 681. The Court also recognized that the decision to terminate was based on economic (*i.e.*, cost) considerations, and it was surely aware that the major element of the employer's costs in that case was its labor costs. In sum, the clear import of the Court's decision was that management was not required to bargain about its decision to terminate or about the elimination of jobs that would necessarily result from that decision.

Although the Third Circuit recognized, and indeed regretted, that the consequence of its decision was to give the unions an effective veto over the sale itself, contrary to *First National Maintenance*,<sup>9</sup> it concluded that that result was compelled by this Court's earlier decision under the Railway Labor Act in *Railroad Telegraphers Union v. Chicago & N.W.R. Co.*, 362 U.S. 330 (1960). South Dakota submits that *Telegraphers* does not require the result the court below reached in this case. In *Telegraphers* the Court held that a union was entitled to request bargaining with respect to a railroad's decision to close certain stations. Plainly, however, the myriad decisions involved in a business enterprise fall along a spectrum ranging from those that are clearly appropriate for collective bargaining, such as wages and hours, and

<sup>9</sup> Thus the court stated: "We concede that P&LE has made a powerful argument, for imposing the RLA requirements in this situation may well have the practical effect of torpedoing the sale." 845 F.2d at 429. It also acknowledged and did not deny PL&E's claim that the effect of the district court's injunction was to give the unions "a powerful tool for delay," contrary to this Court's teaching in *First National Maintenance*. 845 F.2d at 431.

those that are not. Many decisions in the middle may not be readily classified in one category or another, and in South Dakota's submission the station closing decision involved in *Telegraphers* was one such decision. In any event, however, the scope and nature of that decision were very different, and far more limited, than the decision of P&LE in this case to sell all of lines or the decision of C&NW in No. 87-2049 to sell a 900-mile segment of its system. *Telegraphers*, in essence, involved a railroad's adjustments to its ongoing operations, not a decision to terminate them altogether.

While it seems clear that the "effects" of a business termination decision which management must bargain about should be held not to include the elimination of jobs necessarily resulting from that decision, South Dakota submits more generally that "effects" should be held not to include bargaining with respect to any demands which would necessarily prevent the decision itself. The reason is the same. If unions could insist on bargaining over demands that would, as a practical matter, preclude the transaction, they would, in effect, be bargaining over the transaction itself.<sup>10</sup>

This is precisely the conclusion the First Circuit reached in *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549 (1st Cir.), cert. denied, 409 U.S. 845 (1972), which the Court cited with approval in *First National-Maintenance*, 452 U.S. at 683, n.20. In *Northeast Airlines*, the union sought to delay the company's impending merger pending bargaining over the merger decision and the effects thereof. 473 F.2d at 551-52. The First Circuit rejected the union's contentions, holding that the decision to merge—

<sup>10</sup> If, for example, unions could insist on bargaining about the "effects" on employees of the selection of a new board chairman by demanding lifetime job protection from any business termination decisions he might make in the future, they would in effect be bargaining over the selection itself.

was not a subject of mandatory bargaining. *Id.* at 557. Allowing the union to bargain over the merger would

infringe greatly upon [the company's] control over [its] investment. Moreover, the nature of the decision itself makes it excessively burdensome to bring the union into the decision-making process. . . . [M]erger negotiations require a secrecy, flexibility and quickness antithetical to collective bargaining.

*Id.* (citation omitted).

More importantly, the *Northeast Airlines* court recognized the collision that is inevitable when the scope of "effects" bargaining is given too broad an interpretation.

To allow the Union to force a company to bargain about the effects of its management decisions to the extent of forcing it to forego the proposed change in operations would be in effect to take away from it the freedom to make the decision in the first place. We have no doubt but that an employer, bargaining about the effect of a relocation on employment conditions, could refuse to discuss as unreasonable any labor protective terms that would make it prohibitively expensive to move. Where it is clear, as in the case of a merger, that bargaining about some effects of the decision would be ineffectual unless the company could be required to renegotiate the merger, we believe that the duty to bargain about those effects does not arise at all.

*Id.* at 558-59 (citation omitted).

It is, of course, not possible to state as a general matter what demands would necessarily foreclose decisions that are exclusively management's to make; that determination will require judgments on a case-by-case basis. In this case, South Dakota submits that the demands made by P&LE's unions, like those of C&NW's unions in No. 87-2049, are clearly ones that would preclude the decisions of management as a practical matter.

Moreover, in this class of cases there is a solid and authoritative basis for that conclusion—namely the determination of the ICC in *Ex Parte No. 392* and the findings on which that determination was based. In *Ex Parte No. 392* the ICC concluded that the employee protections that it normally imposes as a condition of railroad abandonments and mergers should as a general rule *not* be imposed on either the selling or purchasing party in line sales under 49 U.S.C. § 10901. That conclusion was grounded on its determination, based on its expertise and long experience with this class of transactions, that such transactions usually involve unprofitable or marginally profitable lines and that the imposition of standard labor protections, which have been described by the courts as “costly” and “onerous,”<sup>11</sup> would usually impose too great a cost on the new enterprise, and therefore preclude most such transfers as an economic matter, contrary to the strong public interest in encouraging them. 1 I.C.C. 2d at 813-814. A major contributing cause to the uneconomic or marginal status of such lines are the labor costs of the selling railroad, which the new companies can usually reduce unless they must bear the costs of labor protection. Accordingly, the ICC decided not to impose those labor protections in § 10901 transactions as a general matter, although its *Ex Parte 392* procedure gives employees an opportunity to show that such protections are appropriate in particular transactions.

In this case and in this class of cases, however, the unions are demanding, in the guise of “effects” bargaining, the very employee protections that the ICC has found will generally preclude the transaction as a practical matter. In South Dakota’s submission, bargaining over those kind of demands amounts, in practical effect, to bargaining over the transaction itself and is therefore not required by the Railway Labor Act.

<sup>11</sup> *Simmons v. ICC*, 760 F.2d 126, 131 (7th Cir. 1985).

**C. The Railway Labor Act Does Not In Any Event Require Employers To Complete “Effects” Bargaining Before Undertaking Business Termination Decisions.**

If this Court concludes, contrary to the foregoing submission, that the Section 6 notices filed by P&LE’s unions present mandatory subjects of bargaining, the critical question becomes *when* such bargaining must take place. South Dakota submits that even on the assumption that P&LE must bargain over the demands set forth in the Section 6 notices, the Third Circuit erred in holding that P&LE is precluded from consummating the sale until it completes the bargaining process pursuant to the procedures of the Railway Labor Act.<sup>12</sup> Again, as the Third Circuit itself recognized, that result effectively negates the proposition that the business termination decision itself is not a subject of mandatory bargaining. Its decision, however, is based upon a fundamental misunderstanding of the status quo requirement of the Railway Labor Act, and it has unjustifiably led to the virtual cessation of such transactions within the rail industry.

The Third Circuit based its decision on the status quo requirement contained in the Railway Labor Act, which provides that the parties may not unilaterally alter the “rates of pay, rules or working conditions.” 45 U.S.C. § 156. This status quo requirement, as it has become known, includes not only those terms included in the collective bargaining agreement, but also those “actual, objective working conditions” that past practice or custom have established. *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 153 (1969). The Third Circuit applied this standard in such a fashion so as to require that all conditions be frozen as of the

<sup>12</sup> Indeed it is noteworthy that P&LE itself has taken the position that it is willing to bargain about those demands, but that it need not do so before the sale is consummated.

time the union served its section 6 notices. This is clearly erroneous.

The status quo does not require that the carrier's operations be frozen as of the time when the major dispute arose. Rather, the carrier's activities continue and actions which it takes are subject to those terms and conditions of the collective bargaining agreement and any other longstanding practices.

Cases defining the status quo under the Railway Labor Act have recognized that the status quo requirement does not mandate the absolute freeze in conditions that the Third Circuit held to be necessary. In *Detroit & Toledo*, on which the Third Circuit mistakenly relied, the company sought to make outlying assignments, a practice not covered in the existing collective bargaining agreements nor done in the past. *Id.* at 154. The Court held that the railroad could not make the new assignments without violating the status quo. *Id.* The company, however, could have made those new assignments if they had had a previous practice of making such outlying assignments without violating the status quo even though the subject was being bargained over. *Id.* at 153-54. Thus, *Detroit & Toledo* does not prohibit company activity just because the union seeks to bargain over it. If the activity is allowed by agreement or custom, it may occur until or unless the parties reach an agreement to the contrary.

Cases since *Detroit & Toledo* have consistently followed this reasoning. In *United Transp. Union v. St. Paul Union Depot Co.*, 434 F.2d 220 (8th Cir. 1970), cert. denied, 401 U.S. 975 (1971), the union sought to add to the collective bargaining agreement a provision requiring negotiation before the company abolished any jobs. *Id.* at 221. Before the court, the parties stipulated that an established practice existed that allowed the company to unilaterally abolish jobs. *Id.* at 223. Accordingly, the

court held that the abolishment of positions while bargaining was taking place did not violate the status quo because the railroad could always abolish jobs. *Id.* If the company were prevented from abolishing jobs, the status quo would, in fact, be changed. *Id.*

Similarly, in *Baker v. United Transp. Union*, 455 F.2d 149 (1st Cir. 1971), the company changed examination sites for its employees. *Id.* at 153. The company took this action while negotiating with the union over the issue of examination sites and the union protested this action as a violation of the status quo. *Id.* The court found that the company had a previously established practice of changing examination sites and thus its action did not violate the status quo:

If management had had the ability of freely changing examination sites before the notice, depriving - it of that ability and requiring that it continue examination sites then in existence throughout the long, deliberately drawn out process of negotiations and mediation under the Act, would not be a continuation of any prior existing condition. It would be the creation of a new condition.

*Id.* at 157.

It is clear and undisputed that P&LE has always had the *ability* to go out of business or to sell all or part of its lines, and thus to eliminate jobs as a necessary concomitant of those actions. See, e.g., *First National Maintenance*, 452 U.S. at 677; *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 257, 268 (1965). RLEA has never contended otherwise. The collective bargaining agreements contain no limitation on this right nor does any established practice limit the right to go out of business. This management prerogative to determine the scope and very existence of its business is the status quo.

The injunction issued in this case, however, completely stands the status quo requirement on its head. It in fact

alters the status quo just as the unions unsuccessfully attempted to do in *St. Paul Union Depot* and *Baker*. The Third Circuit has ordered that P&LE refrain from terminating its operations, something it has always been able to do under existing agreements and practices. The unions admit by their very actions in federal court that they are seeking to change P&LE's ability to terminate its business. Preventing the sale alters the status quo.

Cases arising under the National Labor Relations Act illustrate the correct application of the status quo requirement in effects bargaining situations. Like the Railway Labor Act, the National Labor Relations Act provides that the parties may not unilaterally change the terms and conditions of employment when mandatory subjects of bargaining are being negotiated. *NLRB v. Katz*, 369 U.S. 736, 742 (1962). Yet this status quo requirement does not act to delay a company's sale of its business. Effects bargaining may occur and does occur *after* the sale is completed. See, e.g., *Parker v. Conners Steel Co.*, 855 F.2d 1510, 1514 (11th Cir. 1988); *Vitek Electronics, Inc. v. NLRB*, 763 F.2d 561, 566 (3d Cir. 1985).

It is even more critical that effects bargaining be allowed to occur after the completion of sales in transactions by carriers governed by the Railway Labor Act. The status quo requirement of the National Labor Relations Act, like the Railway Labor Act, only applies until impasse is reached. *Katz*, 369 U.S. at 742. Under the National Labor Relations Act, however, impasse may be reached relatively quickly, *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 108 S.Ct. 830, 833 n.5, whereas the Railway Labor Act requires what this Court has termed an "almost interminable process" of negotiation.<sup>13</sup> Consequently, to require effects bargaining before the decision to sell can be implemented is to give labor a complete veto over such deci-

<sup>13</sup> *Detroit & Toledo*, 396 U.S. at 149.

sions, and the decision below has had the predictable effect of blocking virtually all transactions for the past nine months. Few buyers are willing to wait around for a couple of years to buy a multi-million dollar business.

In sum, the status quo is P&LE's existing right under law and its collective agreements to sell its lines and go out of business. The injunction which now prevents the sale from going forward does not preserve the status quo but violates it.

## II. THE NORRIS-LA GUARDIA ACT DOES NOT PROHIBIT INJUNCTIONS TO PREVENT STRIKES TO PROTEST A RAILROAD'S SALE OF ITS LINE

For the reasons previously discussed, the questions concerning the scope of a railroad's bargaining obligation in connection with a sale of its lines are extremely important to the future of the national rail system. An equally important question is the one presented by the Third Circuit's decision in No. 87-1589: whether Section 4 of the Norris-La Guardia Act, 29 U.S.C. § 104, prohibits courts from enjoining strikes in protest of such sales. That question is critical because even if the Court holds that these sales are not mandatory subjects of bargaining under the Railway Labor Act, or that the Railway Labor Act permits such sales to be consummated prior to bargaining about their effects, most such sales would not be feasible if unions were free to strike in order to exact the desired conditions by that means.

In South Dakota's submission, the Norris-La Guardia Act does not preclude enjoining such strikes for two reasons. First, that Act only bars injunctions "in any case involving or growing out of a labor dispute . . . ." 29 U.S.C. § 104. If the Court finds that the line sales and their effects are matters committed exclusively to management and are not mandatory subjects of bargaining, then strikes over such matters should be held not to be ones that grow out of a "labor dispute" within the mean-

ing of the Norris-La Guardia Act. To conclude that employees may strike over matters they have no right to bargain about with management would frustrate the basic purpose and design of the Railway Labor Act to promote industrial peace by defining, in a broad but not unlimited fashion, those subjects about which management must bargain about with labor and by carefully prescribing the mechanisms for resolving disputes over these matters. The Norris-La Guardia Act complements that scheme by ensuring that, in cases in which the bargaining and mediation process finally results in impasse, employees are free to use their economic power by striking to obtain their ends. The Norris-La Guardia Act was not enacted to allow employees to strike over matters that are not appropriate subjects of collective bargaining. See *Japan Air Lines*, 538 F.2d at 52-53.

Second, if the Court concludes that the effects of line sales are mandatory subjects of bargaining under the Railway Labor Act but that the railroad may consummate the sale prior to completing such bargaining, then any strike over the matter would violate the Railway Labor Act's major disputes provisions. It is well established that the Norris-La Guardia Act does not preclude injunctions issued to enforce the provisions and procedures of the Railway Labor Act. See, e.g., *Burlington Northern R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 107 S.Ct. 1841, 1851 (1987); *Chicago & N.W.R. Co. v. Transportation Union*, 402 U.S. at 581.

### CONCLUSION

The decisions of the court of appeals should be reversed.

Respectfully submitted,

RICHARD A. ALLEN  
Counsel of Record  
JULIE A. TIGGES  
ZUCKERT, SCOUTT &  
RASENBERGER  
888 17th Street, N.W.  
Washington, D.C. 20006-3959  
(202) 298-8660  
*Attorneys for Amicus Curiae*  
*The State of South Dakota*

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,  
*Petitioner,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE

DAVID SILBERMAN  
LAURENCE GOLD  
(Counsel of Record)  
815 16th Street, N.W.  
Washington, D.C. 20006  
(202) 637-5390

33 p/

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On Writ of Certiorari to the  
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**BRIEF OF THE AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE**

---

The American Federation of Labor and Congress of Industrial Organizations, a federation of 87 labor unions representing approximately 13,500,000 working men and women, submits this brief *amicus curiae* with the consent of the parties as provided for by the Rules of this Court.

**ARGUMENT**

**Introduction and Summary**

This case poses a question that is arising with increasing frequency and urgency in today's economy: when a business entity goes through a reorganization which results in operations previously performed by a "predecessor" firm being performed by a "successor" firm, to what extent can the predecessor's employees, through collective bargaining and collective bargaining agreements, protect their jobs and their labor standards?

We pose the question in these terms to emphasize at the very outset what is *not* at issue in this case. That is especially important here because the briefs on the other side are to a very large extent devoted to arguing hypothetical questions that are not posed by this proceeding.

*First*, this case does *not* present any question as to the right of the petitioner Pittsburgh & Lake Erie Railroad Company ("P&LE") to decide to sell its assets to some other entity, and to so decide without bargaining with the exclusive representatives of the P&LE employees. As the court below aptly stated, "The dispute in this case is not about the decision to sell the P&LE's rail lines; it is about the effects of that decision on the employees of the railroad." 845 F.2d at 428. In other words, this case is *not* a variation on the cases such as *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), in which this Court has confronted the question of whether an employer that intends to close an operation—or transfer the operation to a third person—has an obligation to bargain in good faith with the representative of the affected employees over that business decision itself. *See id.* at 677 & n.15, 681-682 (discussing the established distinction between such "decision" bargaining and "effects" bargaining).

*Second*, this case does *not*, moreover, present any contract interpretation question. P&LE does not have even a colorable claim that its employees' unions have agreed—explicitly or implicitly, in general terms through a management rights clause or in specific terms through a clause dealing directly with the rights of a successor employer, in direct bargaining or by acquiescence in an established past practice—to a reorganization in which a successor employer would be free to continue the P&LE operations, in whole or in part, with a new workforce paid lower wages and accorded lesser working conditions.

*Third*, this case likewise does *not* present any question as to the right of the P&LE, or of its successor, to dis-

continue certain operations—as opposed to shifting the performance of those operations from one business entity to another—and to furlough the employees whose work is eliminated as the result of the discontinuance. Under its collective bargaining agreements, P&LE is authorized to make furloughs where work is eliminated and P&LE has, in fact, from time to time, exercised that right. And, on any view of this case, P&LE's would-be successor—P&LE Railco—likewise would assume that right. To put this point in concrete terms, it is uncontested that were the transaction between P&LE and P&LE Railco to be consummated, Railco would be free, without the need to engage in a new round of collective bargaining, to operate with the number of employees commensurate to the size and nature of Railco's operations and not the number commensurate to the size and nature of P&LE's present operations.

What is at issue here is whether P&LE Railco also would be free—without securing a new collective bargaining agreement and, indeed, without engaging in collective bargaining—to both continue the P&LE operations and hire an entirely new workforce to do the work under newly-established wages and working conditions. It is our submission that permitting P&LE Railco to do so would be fundamentally inconsistent with the policies of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA").

In arguing for that conclusion, our analysis diverges to some extent from the reasoning of the decision below. That decision rests on the premise that, if P&LE were to consummate the sale of its assets to P&LE Railco, the successor would *not* be bound by the current collective bargaining agreements, at least absent an express provision in the agreements which binds successors. 845 F.2d at 422. On that premise, in these circumstances, the successor would be free to disturb the status quo—specifically to hire new employees and establish new wages

and working conditions—without exhausting the RLA's procedures for amending or modifying such agreements. Thus, the appellate court understood this case to turn on the extent of the P&LE duty to bargain over "the effects on the employees of the sale," in response to a notice by the representatives of its employees under § 6 of the RLA, 45 U.S.C. § 156, seeking such bargaining and the extent of P&LE's further duty to maintain the status quo pending the conclusion of the RLA's mandated bargaining process. See 845 F.2d at 432.

In Part I we show that this premise of the decision below is unsound. Under the RLA, where a corporate reorganization results in a successor which continues the predecessor's operations (in whole or in part), the RLA treats the business as ongoing and as a matter of law requires both the successor and the union to abide by the current collective bargaining agreement until modified through bargaining. In this respect, the RLA differs from the National Labor Relations Act, as amended by the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.* ("NLRA"), which ordinarily frees a successor employer from a predecessor's labor contracts and frees the employees affected by the corporate transaction to exercise economic leverage to preserve or improve their labor standards in successorship situations.

In Part II we accept *arguendo* the premise of the decision below, and address P&LE's bargaining and status quo obligations under the RLA. As we show, at the very least, the RLA precludes P&LE from reorganizing in a manner that would alter the "objective working conditions" of P&LE's employees for so long as the Company and its employees' exclusive representatives are involved in the process of negotiations and mediation over the effects of the reorganization on those employees mandated by RLA § 6. The issues raised by that notice were, under this Court's decision in *Telegraphers v. Chicago N.W.R. Co.*, 362 U.S. 330 (1960), bargainable issues.

That being so, § 6 requires P&LE to preserve the "actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." *Shore Line v. Transportation Union*, 396 U.S. 142, 153 (1969). By taking action—not expressly authorized by the extant collective bargaining agreement or by settled past practice—to terminate the employment of P&LE's employees and to provide for the hiring of a new workforce of one-third the present size paid at reduced wages, P&LE would violate its obligation under § 6 to preserve the preexisting "objective working conditions." For this reason, too, the court below properly issued an injunction to preserve the status quo.

**I. The Railway Labor Act Provides, As A Matter of Law, That Collective Bargaining Agreements Survive Corporate Reorganizations Such As The One Here And Bind The Corporate Entity That Emerges From The Reorganization**

A. The threshold question raised by this case concerns the rules the RLA establishes for determining the status of a collective bargaining agreement over a corporate reorganization. That is a question of first impression in this Court. In contrast, however, this Court has faced the comparable question in a trilogy of NLRA "successorship" cases.

This Court has repeatedly "emphasized that the NLRA 'cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes.'" *TWA Inc. v. Flight Attendants*, — U.S. — (Feb. 28, 1989), Sl. Op. p. 11 quoting *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 383 (1969). At the same time, the Court has recognized that carefully drawn analogies from the federal common labor law developed under the NLRA may be helpful in decid-

ing cases under the RLA. *TWA*, Sl. Op. at p. 5. We therefore begin our analysis with a discussion of the NLRA successorship decisions in this Court.

In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), the predecessor, Interscience, was acquired by, and merged into, the successor, Wiley, which hired virtually all of Interscience's employees. The Union representing Interscience's employees sued under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to enforce the extant collective bargaining agreement against Wiley. In particular, the union sought to compel Wiley to abide by the arbitration provision in the agreement. The Court ruled for the union stating:

We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances . . . the successor employer may be required to arbitrate with the union under the agreement. [376 U.S. at 548.]

The Court explained that the "objectives of national labor policy . . . require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." *Id.* at 549. And while recognizing that "the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party," *id.* at 550, the Court concluded that "a collective bargaining agreement is not an ordinary contract":

Central to the peculiar status and function of a collective bargaining agreement is the fact . . . that it is not in any real sense the simple product of a consensual relationship. . . . This case cannot readily be assimilated to the category of those in which

there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. [*Id.*]

Thus, at least so long as there is "substantial continuity of identity in the business enterprise" so that a duty to arbitrate can "reasonably be found in the particular bargaining agreement and the acts of the parties involved," *id.* at 551, the "preference of national labor policy for arbitration as a substitute for tests of strength between contending forces" during the term of a collective bargaining agreement dictates binding the successor to the preexisting agreement, *id.* at 549.<sup>1</sup>

In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Court returned to the competing interests in industrial peace and in the freedom of collective bargaining addressed in *Wiley*, albeit in a rather different context. The question in that case was whether Burns—which had successfully bid on and taken over a contract to provide plant security protection and had hired the predecessor's employees to perform the underlying work—had violated the bargaining obligation stated in NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5), by refusing to assume the extant collective bargaining agreement and by unilaterally fixing the initial terms on which Burns

<sup>1</sup> The *Wiley* rule does not apply where the transaction integrates the predecessor's operations and workforce into a larger successor's operations and workforce and the latter group of employees is already represented by a certified representative and covered by a collective bargaining agreement. See, e.g., *McGuire v. Humble Oil & Refining Co.*, 355 F.2d 352 (C.A. 2, 1966).

In the instant case, of course, the putative successor is a new entity which prior to the transaction had no employees of its own. Thus, this case does not raise any of the questions which arise from transactions which result in the integration of two workforces or the respective rights of competing labor organizations during and after such a transaction. We therefore do not address that complex of issues in this brief.

would hire its predecessor's employees. The Court answered that question in the negative.

Distinguishing *Wiley*, the *Burns* Court concluded that although *Burns* was obligated by § 8(a)(5) to bargain with the union which represented the predecessor's employees, that section does not require a successor employer to assume the predecessor's labor contract. The Court concluded that it is the policy of the NLRA in such successorship situations "to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities." 406 U.S. at 288. The opposite conclusion, the Court stated, could "inhibit the transfer of capital," by limiting the successor's ability to "make changes in corporate structure, composition of the labor force, work locations, task assignments, and nature of supervision." *Id.* at 287-288.

Two years after deciding *Burns*, the Court again confronted the successorship issue in *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (1974). Like *Wiley*, and unlike *Burns*, *Howard Johnson* was a § 301 action to enforce a collective bargaining agreement. Unlike both *Wiley* and *Burns*, however, the successor in *Howard Johnson* had acquired certain of the predecessor's operations in an asset sale and had hired a new workforce rather than retaining the incumbent employees. And, unlike *Wiley*, the predecessor firm in *Howard Johnson* continued in business albeit in different locations. The Court concluded that in the context of the kind of transaction involved in *Howard Johnson*, it was "improper to hold [the successor] to the substantive terms of a collective bargaining agreement which it had neither expressly nor impliedly assumed." 417 U.S. at 255.

In reaching this conclusion the *Howard Johnson* Court distinguished *Wiley* on two grounds. To begin with, the Court observed, *Wiley* "involved a merger, as a result of which the initial employing entity completely disap-

peared. In contrast, this case involves only a sale of some assets, and the initial employers remain in existence as viable corporate entities." 417 U.S. at 257. Furthermore, in *Wiley*, "the surviving corporation hired all of the employees of the disappearing corporation," whereas *Howard Johnson* exercised what the Court termed "the new employer's right to operate the enterprise with his own independent labor force," *id.* at 258, 264 (emphasis in original.)<sup>2</sup>

B. Read together, *Wiley*, *Burns*, and *Howard Johnson* teach, first of all, that under the NLRA, "[i]n light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate." *Howard Johnson*, 417 U.S. at 456.

On the facts in *Wiley*, in which the contracting employer "disappear[ed]" into another "by merger," followed by the "wholesale transfer of [the predecessor's] employees," 376 U.S. at 548, 551, the Court found that the interest in avoiding "industrial strife" outweighed "the rightful prerogative of owners independently to rearrange their businesses," *id.*, at 549.<sup>3</sup>

<sup>2</sup> The *Howard Johnson* Court acknowledged that its holding cut off the union's ability to enforce the provision of its extant collective bargaining agreement, which stated that the agreement was binding on successors, against the successor and indicated that the union's only option was to seek enforcement against the predecessor. 417 U.S. at 258 & n.3.

The Court intimated, moreover, that where a predecessor and successor do not abide by such a provision a union might "enjoin the sale . . . on the ground that this was a breach by the [predecessor] of the successorship clauses in the collective bargaining agreements," *Id.*

<sup>3</sup> There may be other situations as well in which it is "within the reasonable expectations of the parties," *Howard Johnson*, 417 U.S. at 257, that a collective agreement will survive a corporate reorganization, and in which the successor will be deemed to have

In contrast, in the contracting out situation involved in *Burns* and in the type of asset sale involved in *Howard Johnson*, the Court found that the interest in "freedom of collective bargaining" and in the "free transfer of capital" predominates over the interest in industrial peace, *Howard Johnson*, 417 U.S. at 254-255.

We hasten to add—for it is absolutely central to the decisions—that the employer freedoms recognized in *Burns* and in *Howard Johnson* are not absolute; the Court has recognized that the affected employees, too, are free to advance and protect their interests. The NLRA leaves the determination of the respective rights of the parties to "the relative strength . . . of the contending forces," "Howard Johnson, 417 U.S. at 264, and to "economic power realities," *Burns*, 406 U.S. at 288. The affected employees have the right to apply economic pressure against the predecessor-employer to require that employer to protect the employees over a transition. And, if the successor elects to hire the predecessor's employees and thereby assumes a bargaining obligation, the employees have the right to apply economic pressure against the successor as well. In either event "[t]he congressional policy manifest in the [NLRA] is to enable the parties to negotiate for any protection either deems appropriate." *Id.*

C. The foregoing summary of the NLRA successorship law is sufficient to demonstrate that this Court has made one salient point so plain as to be beyond any dispute: the NLRA would *not* permit the result that P&LE seeks here.<sup>4</sup> According to P&LE, the Company may consum-

"assumed the obligations under the old contract," *Burns*, 406 U.S. at 291.

<sup>4</sup> There is, of course, much that remains unsettled under the NLRA regarding successorship. Indeed, it is far from certain how this case would come out under the NLRA.

On the one hand, the transaction between P&LE and P&LE Railco is, in form, an asset sale like the sale in *Howard Johnson*;

mate the sale to P&LE Railco and Railco is free to hire a new workforce and to establish new wages and working conditions without regard to P&LE's collective bargaining agreements, yet P&LE's employees are not free to respond by using their economic leverage to protect their jobs and their wages. As P&LE puts its contention in its brief, the Company is free to act to rearrange its affairs without going through the RLA bargaining process and without any ado but its "unions were free to strike only after having exhausted the RLA's major dispute procedures. Their strike prior to the exhaustion of those procedures violated the RLA." Pet. Br. at 65.

The regime P&LE champions is anathema to the NLRA. *Burns* could not be clearer in this regard:

Preventing industrial strife is an important aim of federal labor legislation but Congress has not chosen to make the bargaining freedom of employers and unions totally subordinate to this goal. When a bargaining impasse is reached, strikes and lockouts may occur. This bargaining freedom means both that parties need not make any concessions as a result of Government compulsion and that they are free from having provisions imposed upon them against their will. [407 U.S. at 287.]

And the *Burns*' opinion continues:

The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of

so viewed, the collective bargaining agreement would not survive this transaction in an NLRA case.

On the other hand, under P&LE's version of this transaction, what the Company is seeking to do is to "go out of business," Pet. Br. at 14, 18, 21, 22, 25, and to be succeeded by P&LE Railco which is prepared to "give preference to P&LE employees in establishing its workforce," Pet. Br. at 4. Such a transaction is, in its substance, quite similar to the transaction at issue in *Wiley* and thus one in which it would follow from *Wiley* that the extant collective bargaining agreement would survive.

bargaining advantage to be set by economic power realities." Under the NLRA the "price" of "bargaining freedom" is that "strikes and lockouts may occur." [*Id.* at 288.]

D. The imbalanced system P&LE urges—one in which employers can act but employees cannot react—is equally at war with the RLA's premises. Like the NLRA, the RLA protects "the ultimate right of the disputants to resort to self-help," including "[o]n the side of labor . . . the cherished right to strike." *Railroad Trainmen*, *supra*, 394 U.S. at 378, 384. Indeed, "[p]eaceful primary strikes and picketing incident thereto lie within the core of protected self-help under the Railway Labor Act." *Id.* at 386. And like the NLRA, the RLA provides for a *balanced* system which "let[s] loose the full economic power of each [party]" when "the machinery of industrial peace fails." *Id.* at 384.

*Railway Clerks v. Florida East Coast R. Co.*, 384 U.S. 238 (1966), is illustrative in this regard. There this Court rejected a union's attempt to prevent an employer from altering the status quo once the union had commenced a strike; the Court reasoned that "[i]f [the status quo concept in] § 2, Seventh is applicable after a lawful strike has been called and after lawful self-help has been invoked by the carrier, the right of self-help might become unilateral to the workers alone and denied the carrier." *Id.* at 246 (emphasis added).

Conversely, in *Shore Line v. Transportation Union*, 396 U.S. 142 (1969), the Court prevented an employer from acting unilaterally even though in that case the contract did not prohibit the particular action the carrier sought to take. The Court explained that "If the railroad is free to . . . resort to self-help" during the RLA's bargaining process "the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act's remedies work effectively." *Id.* at 155 (emphasis added).

Thus, P&LE's argument for a rule under which employers may take unilateral action but the affected employees are barred for reacting must be rejected as incompatible with the structure and policies of the RLA.

E. The question posed here thus reduces to whether in this case, as in *Wiley*, the extant collective bargaining agreement should be held, as a matter of law, to continue over the corporate reorganization, or whether, as in *Burns* and in *Howard Johnson*, the relationships between P&LE, P&LE Railco and P&LE's employees should be settled by "'the relative strength of the contending forces.'" The former conclusion would obligate P&LE Railco to continue employing those P&LE employees for whom work remains under the wages, rules and working conditions provided for in P&LE's collective bargaining agreements. The latter conclusion would free Railco to hire a new workforce under new working conditions and would also free the P&LE employees to exercise their economic leverage to protect their jobs and labor standards.

Before turning to the legislative materials bearing directly on the choice that is posed, one threshold point is in order. As just explained, the RLA, like the NLRA, accords an equal and balanced right to each of the parties to a labor dispute to engage in economic self-help. The two labor laws diverge, however, in that the RLA much more strongly than the NLRA *disfavors* such economic warfare. The RLA rests on the premise that in rail and air disputes, "more is involved than the settlement of a private controversy without appreciable consequences to the public"; "[i]n our complex society, metropolitan areas in particular might suffer a calamity if rail service for freight or for passengers were stopped." *Florida East Coast*, 384 U.S. at 244. Thus the RLA's "primary objective [is] the prevention of strikes." *Shore Line*, 396 U.S. at 154 (emphasis added).

It is for this reason that the RLA creates "an almost interminable process" of "negotiation, mediation, volun-

tary arbitration and conciliation," and contains a set of status quo provisions designed "to prevent the union from striking and management from doing anything that would justify a strike." 396 U.S. at 149-51. As the Court has stated, "the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Id.* at 149, quoting *Florida East Coast*, 384 U.S. at 246.

It would be fundamentally inconsistent with this statutory scheme to hold that corporate reorganizations, accomplished through an asset sale, in which the successor corporations continues the predecessors operations in whole or in part, create a new occasion for economic warfare. It is not surprising, then, that whereas under the NLRA there is an "absence of congressional guidance," *Howard Johnson*, 417 U.S. at 456, as to the status of extant collective bargaining agreements in such successorship situations, Congress has *specifically focused* on that question in the RLA context. As we now show, in so doing Congress has concluded that, as a matter of law, collective bargaining agreements should be held to continue across such corporate reorganizations.

(1) Congress first addressed this issue in 1933 in enacting a set of amendments to the Bankruptcy Code. *See* 47 Stat. 1467. Those amendments, *inter alia*, created for the first time a procedure by which the railroads could invoke the protection of the bankruptcy courts. (Prior to the 1933 amendments, railroads were subject to equity receiverships at the behest of creditors but could not avail themselves of the bankruptcy procedure.) Significantly, in extending to railroads the right to invoke bankruptcy, Congress mandated in § 77(o) of the 1933 Bankruptcy Act that

No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees, except in the manner prescribed in the Railway Labor Act. . .

The legislative history makes clear that Congress adopted this provision because "in some instances equity receivers have disregarded the provisions of the railway labor act and have arbitrarily reduced the wage scale." 76 Cong. Rec. 2927 (Rep. LaGuardia). Congress thus sought to "*keep effective the machinery under which railroads in their ordinary operations change their wage scale*, and so forth, as between themselves and their employees." *Id.* at 5355 (Rep. Summers, Chairman of the House Judiciary Committee) (emphasis added). *See also id.* at 5118-22.

Thus, Congress determined that not even the exigencies of the transition over a bankruptcy reorganization justify freeing the successor from extant RLA collective bargaining agreements.

(2) Several months after enacting the Bankruptcy Amendments, Congress considered a related aspect of the same problem in connection with the enactment of the Emergency Railroad Transportation Act, 48 Stat. 211 ("ERTA"). That law created for up to two years a "Federal Coordinator of Transportation" whose task it was to facilitate the consolidation of railroads in order to "avoid unnecessary duplication of services," ERTA § 4(a); towards that end, ERTA suspended the operation of the antitrust laws and "all other restraints or prohibitions of law, State or Federal, other than such as are for the protection of the public health or safety," ERTA § 10(a). ERTA specifically provided, however,

That nothing herein shall be construed to repeal, amend, suspend or modify any of the requirements of the Railway labor Act or the duties and obligations imposed thereunder *or through contracts entered into in accordance with the provisions of said Act* [*Id.*; emphasis added]

And ERTA further provided that

Carriers, whether under control of a judge, trustee, receiver, or private management, shall be required

to comply with the provisions of the Railway labor Act and with the provisions of section 77 . . . of the [1933 Bankruptcy] Act [ERTA, § 7(e)]

This latter provision was one of several amendments to the original bill that the rail unions, through their Railway Labor Executives Association ("RLEA"), presented to the Senate and House Committees in 1933.<sup>5</sup> Indeed, on the floor of both the House and the Senate the sponsors of ERTA made a large point of noting that the bill was supported by the RLEA and incorporated, in substance, the RLEA's suggestions. *See* 77 Cong. Rec. 4256 (Senator Dill); 4870 (Representative Cooper).

In presenting its amendments to the Senate and House Committees, the RLEA, through its legal counsel, Donald Richberg, explained that

In the desire to create economies and the necessity of economy during the depression, we have had simple disregard of the requirements of the law *and the arbitrary changing of working conditions for men all over the country, as part of these consolidations.* [1933 Senate Hearings, *supra*, at 101 (emphasis added).]

Richberg went on to argue that since the Bankruptcy Amendments had prohibited judges and trustees from altering collective agreements over the transition of a bankruptcy reorganization "it seemed appropriate that a similar provision should be written into this law governing the carriers under private management." *Id.* at 106; *see also* 1933 House Hearings, *supra*, at 108. With that understanding, the RLEA proposal was included in the bills recommended by both the House and Senate Committees and passed by the Congress.

<sup>5</sup> *See Hearings Before the Senate Committee on Interstate Commerce on S. 1580*, 73rd Cong. 1st Sess. 85 (1933); *Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 5500*, 73rd Cong. 1st Sess. 72 (1933).

Thus, Congress determined that not even the general financial collapse of the railroad industry justified freeing the successor firms that emerged from consolidations and other reorganizations arranged by the Government from extant RLA collective bargaining agreements.

(3) One year after the enactment of ERTA, Congress amended the RLA. One of the purposes of those amendments was, as Joseph Eastman, the Federal Coordinator of Transportation and principal author of the 1934 bill testified, to "put in the permanent law [*viz.* the RLA] . . . the provisions which the Congress has felt it necessary to apply to railroads both in the Bankruptcy Act and the Emergency Railroad Transportation Act." <sup>6</sup> Mr. Eastman explained:

[T]he principle [of the amendments] was spelled out in definite prohibitions in the Bankruptcy Act, so far as bankrupt carriers are concerned, and that measure is a part of the permanent law. These same definite prohibitions, which were inserted in the Bankruptcy Act, were made applicable to every carrier in [ERTA], but that is a temporary measure. It seems plain that these provisions belong in the permanent law, and the Railway Labor Act is clearly the place for them. That is the reason for section 2 in the proposed bill.<sup>7</sup>

At the time of the 1934 amendments, the RLA already included, in § 6, a prohibition on changes in wages and working conditions while bargaining is underway. But the RLA of 1926 did not include an analogue to the 1933 Bankruptcy Act or to ERTA requiring that RLA collective bargaining agreements would continue over corporation transitions.

<sup>6</sup> *Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 7560*, 73rd Cong., 2d Sess. at 28 (1934), reprinted in 3 ABA Section on Labor and Employment Law, *The Railway Labor Act: A Legislative History* § 3 (1988).

<sup>7</sup> *Id.* at 43.

Congress therefore added § 2, Seventh to the RLA, 45 U.S.C. § 152, Seventh to fill this void by prohibiting "chang[es] in the rates of pay, rules and working conditions of its employees, as a class, as embodied in agreements, except in the manner prescribed in such agreements or in section 6." As this Court has stated, "the purpose of § 2, Seventh is two-fold: it operates to give legal and binding effect to collective agreements, and it lays down the requirement that collective agreements can be changed only by the statutory procedures." *Shore Line*, 396 U.S. at 156.

Thus, Congress determined that the rule continuing extant RLA collective bargaining agreements over bankruptcy reorganizations and emergency consolidations should be made generally applicable to corporate restructurings covered by the RLA.

(4) Finally, it is noteworthy that in 1978, when Congress comprehensively overhauled the Bankruptcy Code, Congress *rejected* proposals to permit trustees and debtors-in-possession to modify collective bargaining agreements in the rail industry without exhausting the RLA's bargaining procedures. Instead, "[r]eflective of the long-standing special treatment afforded railway labor," *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 n.8 (1984), Congress reaffirmed and reenacted the limitation on changes in railroad labor contracts as originally incorporated in the 1933 Bankruptcy Act. The House Judiciary Committee explained:

The subject of railway labor is too delicate and has too long a history for this code to upset established relationship. The balance has been struck over the years. This provision continues the balance unchanged. [H.R. Rep. 95-595, 85th Cong. 1st Sess. at 423 (1977)]

. . . .

The sum of the matter is this: since 1933, Congress has on several different occasions mandated a legal requirement that RLA collective bargaining agreements be

deemed to continue over various forms of corporate reorganizations, such as bankruptcies and consolidations. The office of RLA § 2, Seventh is to state that mandate in general terms as part of the permanent railroad labor law.

Given these congressional actions, it follows that the instant case is properly resolved by holding that, as a matter of law, upon acquiring and continuing to operate P&LE's railroad assets, P&LE Railco is bound by the P&LE collective bargaining agreements as P&LE's successor until such agreements are modified through the processes of the RLA.

## II. Where A Union, Pursuant To RLA § 6, Initiates Bargaining Over The Effects Of A Corporate Reorganization On Incumbent Employees, The Employer Must Preserve The "Objective Working Conditions" Of The Employees Until The Act's Mandated Negotiation Process Is Concluded

Our showing in Part I establishes that the RLA provides, as a matter of law, that the extant P&LE collective bargaining agreements survive a corporate reorganization in which the successor entity continues P&LE's operations. We now show that even if that were not true, the RLA would preclude P&LE from reorganizing in a manner that would alter the "objective working conditions" of P&LE's employees for so long as the Company and its employees' exclusive representatives are involved in the process of negotiations and mediation over the effects of the reorganization on those employees mandated by RLA § 6.

A. Analysis properly begins with RLA § 2, First, 45 U.S.C. § 152, First, which imposes on unions and carriers alike "the duty . . . to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions." As this Court has stated, the duty created by § 2, First lies at "[t]he heart of the Railway Labor Act," *Railroad Trainmen*, *supra*, 394 U.S.

at 377, and "is central to the effective working" of that Act, *Chicago & N.W.R.Co. v. Transportation Union*, 402 U.S. 570, 578 (1971).

RLA § 6, in turn, provides the framework for implementing this duty to bargain. That section provides, in pertinent part, that

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules or working conditions and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice. . .

In this case, the unions sought to invoke § 6 by serving a notice on the carriers stating the unions' desire to negotiate over "the effects of P&LE's proposed reorganization on P&LE's employees." That notice set forth the text of several new provisions the unions sought to have added to the extant collective bargaining agreements in order to afford P&LE's employees enhanced job security in the event of a sale of P&LE's assets.

It is beyond dispute that the unions' proposal constitutes a proper § 6 notice. The unions clearly sought a "change" in the existing "agreements." And the changes the unions sought unmistakably "affect[ed] rates of pay, rules or working conditions," and hence were subject to mandatory bargaining; the unions' proposal, if agreed to, would determine both the "rules" to be followed by any successor employer in staffing its jobs and the "rates of pay" and "working conditions" of the employees of the successor employer.

This Court's decision in *Telegraphers v. Chicago N.W.R. Co.*, 362 U.S. 330 (1960), confirms this reading of § 6. In that case a union, in response to a carriers' plan to consolidate operations and eliminate jobs, served a notice on the carriers stating the union's desire to negotiate a contractual provision prohibiting the elimination of

any jobs. The carrier contended that the union's notice "did not raise a bargainable issue." *Id.* at 332. This Court disagreed, reasoning as follows:

Plainly, the controversy here relates to an effort on the part of the union to change the "terms" of an existing collective bargaining agreement. The change desired just as plainly referred to "conditions of employment" of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. [362 U.S. at 336.]

Thus *Telegraphers*—at the very least—establishes that proposals relating to the effects of a corporate reorganization on the corporation's employees do "raise a bargainable issue."<sup>8</sup>

<sup>8</sup> Indeed, as the passage from *Telegraphers* quoted in text indicates, *Telegraphers* appears to go further and to require bargaining over decisions which affect jobs, such as consolidations of operations and not only over the decisions' effects.

That reading of *Telegraphers* is buttressed by *First National Maintenance, supra*, 452 U.S. at 687 n.23 in which the Court, while holding that the NLRA does *not* require bargaining over a closing decision, suggested that the RLA may well be different because "the mandatory scope for bargaining" under the two laws is "not coextensive." See also *Telegraphers*, 362 U.S. at 338 ("In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively").

Against this background, the suggestion of P&LE and several of its *amici curiae* that the NLRA provides for a broader scope of bargaining than the RLA is both erroneous and beside the point in this case. P&LE bases that argument entirely on the fact that in crafting NLRA § 8(d), 29 U.S.C. § 158(d), the phrase "terms and conditions of employment" rather than the phrase "working condi-

B. Having thus properly invoked RLA § 6's "major dispute" procedures, the unions' notice necessarily triggered the Act's "status quo" obligation as set forth in that section, in § 5, 45 U.S.C. § 155 and in § 10, 45 U.S.C. § 160. Section 6 states the general rule:

In every case where such notice of intended change has been given . . . rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by § 5 of this title, by the Mediation Board. . .

Section 5, in turn, provides that even after the Mediation Board has "finally acted," for a period of "thirty days thereafter . . . no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose." And if, during that 30-day period, a presidential emergency board is appointed, § 10 of the Act provides that "for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

tions" was chosen to delimit the scope of bargaining and that this choice was made because the 1947 Congress viewed the former phrase as broader than the latter. See Pet. Br. at 24-25 & nn.8-9. But RLA § 2, First, requires bargaining over "rules and working conditions"—and not over "working conditions" alone—and there is nothing in the legislative history of NLRA § 8(d) which suggests that the 1947 Congress viewed RLA § 2, First in its entirety as narrower than NLRA § 8(d) in its entirety.

It is of at least equal moment that there is nothing in the legislative history of RLA § 2, First—which was enacted in 1926 not in 1947—to suggest that the 1926 Congress had a narrow scope in mind for the phrase "rules and working conditions."

Thus, the materials on which P&LE relies do not impeach *First National Maintenance's* suggestion that the RLA provides a broader scope for bargaining than the NLRA, and those materials surely do not impeach the holding of *Telegraphers* that issues of the type raised here are bargainable under the RLA.

In the instant case, P&LE proposes to make the most profound changes in the status quo while § 6's negotiation and mediation procedures are underway. At the time the § 6 notice was served, there were 500 P&LE employees covered by the extant collective bargaining agreements who were paid agreed-upon wages and benefits and who worked under agreed-upon conditions. P&LE desires to take actions which would terminate their employment, which would provide for the hiring of a new workforce of one-third the present size, and which would reduce the compensation and fringe benefits of that new workforce. Such action would plainly constitute an "alter[ation]" of "rates of pay, rules, or working conditions" within the ordinary and common-sense meaning of those terms.

P&LE and its *amici curiae* argue, however, that § 6's prohibition on such alterations of the status quo while negotiation and mediation are proceeding should not be read in its ordinary sense. According to P&LE and its *amici curiae*, the words of § 6 are terms of art which maintain nothing more than "the existing provisions, if any, in the parties' collective bargaining agreements which address the effects of corporate transactions." Br. of Airline Industrial Relations Conference at 13. Thus because (in P&LE's view) the Company's proposed actions "would not 'change' the agreements in any respect," those actions are permitted by § 6. See Pet. Br. at 29 (emphasis added). This argument is contrary to both the plain language of the statute and its authoritative construction by this Court.

To begin with, P&LE's argument cannot be squared with the statutory text. According to its terms, § 6 is invoked by a notice "of an intended change in agreements affecting rates of pay, rules or working conditions." But once § 6 is invoked, what must be preserved is, according to the second sentence of § 6, the "rates of pay, rules or working conditions" then in force. While Congress did add the phrase "in agreements" to the first sentence of

§ 6 and Congress could have added the same phrase to the second sentence thereby requiring preservation of only the terms of agreements, the fact is that Congress did not do the latter.

Indeed, the argument that P&LE and its *amici curiae* make here is precisely the argument that was made and rejected in *Shore Line*. That case arose out of a carrier's attempt to change the place of assignment of various of its employees. The union first grieved that proposed change but a Special Board of Adjustment rejected that grievance, finding "nothing in the rules of agreement which precludes this carrier from establishing an outside assignment." 396 U.S. at 146 n.9. The union then filed a notice under § 6 seeking to change the parties' agreement to prohibit the carrier from varying the employees' place of assignment. While the § 6 procedures were underway, the union sought to prevent the carrier from exercising its contractual privilege to vary the assignments.

Before this Court, the carrier argued that "the status quo which the Act equires be maintained consists only of the working conditions specifically covered in the parties' existing collective-bargaining agreement." 396 U.S. at 143. The Court emphatically rejected that contention.

The *Shore Line* Court began (as we did above) by tracing § 6's language and by noting "that the language of § 6 simply does not say what the railroad would have it say. Instead, the section speaks plainly of 'rates of pay, rules, or working conditions' without any limitation to those obligations already embodied in collective agreements." 396 U.S. at 148.

The Court went on to conclude that the "railroad's interpretation of [§ 6] is sharply at variance with the overall design and purpose of the Railway Labor Act," 396 U.S. at 248, explaining:

It would be virtually impossible to include all working conditions in a collective-bargaining agreement.

Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others. When the union moves to bring such a previously uncovered condition within the agreement, it is absolutely essential that the status quo provisions of the Act apply to that working condition if the purpose of the Act is to be fulfilled. If the railroad is free at this stage to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. Only if both sides are equally restrained can the Act's remedies work effectively. [396 U.S. at 154-55.]

Based on this reasoning the Court held that § 6 is properly read to require carriers "to preserve and maintain unchanged those *actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.*" *Id.* at 153 (emphasis added). Applying that test, the Court concluded that the carrier in *Shore Line* could not shift the point of assignments during the status quo period even though there was no contractual prohibition on so doing:

We have stressed that the status quo extends to those actual, objective working conditions out of which the dispute arose, *and clearly these conditions need not be covered in an existing agreement. . . . Here . . . the dispute over the railroad's establishment of the Trenton assignments arose at a time when actual working conditions did not include such assignments. It was therefore incumbent upon the railroad by virtue of § 6 to refrain from making outlying assignments at Trenton or any other place in which there had previously been none, regardless of the fact that the railroad was not precluded from making these assignments under the existing agreement.* [396 U.S. at 153-54 (emphasis added).]

*Shore Line* controls this case. Here, "the dispute . . . arose at a time when actual working conditions" included the collectively-bargained wage rates, benefits, rules, and standards. Thus here, as in *Shore Line*, "it was . . . incumbent upon the railroad by virtue of § 6 to refrain from" altering those conditions pending the outcome of negotiation and mediation.

C. The foregoing is not to say that under *Shore Line* a § 6 notice invariably freezes the precise situation as it exists at the instant the § 6 notice is served. A collective bargaining agreement's express authorization to act in a particular manner is itself part of what we understand the "objective working conditions" to be. Thus the continuing exercise of such an authority according to its terms and in conformity with the prior understandings of the parties after § 6 is invoked would not, in our view, offend that section. By the same token, a carrier may have exercised a particular prerogative in a particular way under particular circumstances with sufficient regularity that the prerogative, too, becomes part of the "objective working conditions"; in that event, the carrier could, during the status-quo period, continue to exercise that prerogative—in the same way and under the same circumstances—without violating § 6. *Shore Line* makes this point explicit:

[T]he mere fact that the collective agreement before us does not expressly prohibit outlying assignments would not have barred the railroad from ordering the assignments that gave rise to the present dispute if, apart from the agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions. [396 U.S. at 153-154.]

Section 6 does not, in other words, trump either party's hand by nullifying their settled expectations firmly grounded in their actual experience under their collective bargaining agreement. Compare, *Air Cargo, Inc. v. Local Union 851*, 733 F.2d 241, 246 (C.A. 2, 1984).

In this case, however, P&LE does not even claim any express contractual authorization to terminate its employees where a corporate reorganization results in the transfer of P&LE operations to another corporate entity. Nor does P&LE claim that its proposed action is of a piece with a well-established past practice. Rather, as we have not seen, P&LE's sole claim is that the action "would not 'change' the agreements in any respect." P. 23 *supra*. And as we have also seen, § 6, as authoritatively construed in *Shore Line*, leaves no room for that argument.

D. P&LE protests the "practical effect" of the statutory interpretation set forth above "is to eliminate the managerial prerogatives of RLA employers." Pet. Br. at 21. Whether in the railroad industry, "go[ing] out of a business is a fundamental managerial prerogative," Pet. Br. at 18, is itself open to serious question. After all, this industry—unlike most other industries (such as those considered in *Textile Workers v. Darlington Co.*, 380 U.S. 263 (1965))—has been so heavily regulated that governmental permission has been required before an enterprise can begin operating as a carrier, and, equally to the point, permission has been required before a certified carrier may end its operations or even reduce its services.

We do not pursue P&LE's complaint further, however, because in any event, P&LE's claim that interpreting § 6 in the manner set forth above would "eliminate managerial prerogatives" is simply wrong. *P&LE has been free at all times to negotiate as part of its labor contracts a clause expressly authorizing P&LE to take the type of action contemplated here.* As we have seen, had P&LE done so, that authorization would have become part of the applicable "objective working conditions" and P&LE's exercise of that authority following receipt of a § 6 notice would not have violated that section. Thus the dilemma P&LE now faces is entirely of its own making as the

result of its failure to negotiate an express authorization of the course of action on which the company now seeks to embark.

It is, of course, true that given that failure, P&LE now faces substantial pressure to succumb to the unions' demands on the effects issues if P&LE wishes to consummate a sale without waiting for a prolonged process of negotiation and mediation. But that pressure is an intrinsic part of the RLA's statutory scheme; as the Court emphasized in *Shore Line*:

[S]ince disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce. [396 U.S. at 150]

Indeed, by seeking to escape that pressure and to be free to act forthwith, P&LE threatens the RLA's fundamental policies. For if the P&LE were free to "resort to self-help, the union cannot be expected to hold back its own economic weapons, including the strike. *Only if both sides are equally restrained can the Act's remedies work effectively.*" *Id.* (emphasis added).

#### CONCLUSION

For the above stated reasons, the decision below should be affirmed.

Respectfully submitted,

DAVID SILBERMAN  
LAURENCE GOLD  
(Counsel of Record)  
815 16th Street, N.W.  
Washington, D.C. 20006  
(202) 637-5390